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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 596. 209.

ALEJANDRO BARKER, VALERIANA BARKER, ANGELA BARKER, ET AL., PLAINTIFFS IN ERROR,

vs.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE ESTATE OF JOHN G. DOWNEY, DECEASED, AND THE MERCHANTS' EXCHANGE BANK OF SAN FRANCISCO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED FEBRUARY 21, 1894.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 536.

ALLEJANDRO BARKER, BALERIANA BARKER, ANGELA BARKER, ET AL., PLAINTIFFS IN ERROR,

vs.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE ESTATE OF JOHN G. DOWNEY, DECEASED, AND THE MERCHANTS' EXCHANGE BANK OF SAN FRANCISCO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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a UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the honorable the judges of the supreme court of the State of California, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of California before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. Downey Harvey, administrator of the estate of John G. Downey, deceased (substituted for John G. Downey), and the Merchants Exchange Bank of San Francisco, a corporation, plaintiffs, and Allejandro Barker, Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasquez, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Romon Pena, Juan Chante, Francisco Nauwila, Guadelupe Nauwila, Maria Ignacio Naurila, Jose Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, Jose Blacktooth, Inez Blacktooth, Salvador Changalagash, Tomasa Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isadora Pena, Jose Maria Chavez, Pasquel Peloat, Francisca Peloat, Jose Juan Oulingawish, Cecilio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpia Rodrigez, Francisco Nawilot, Anastasia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Savivil, Francisca Chutnicat, Silverio Nolasquez, Jose Antonia Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecilio Chiporosa, Francisco Loss, Jose Cecilio, Salvador Gorra, Publicate Logrede, Jose Meechac, Concenciona Meechac, Valentin Meechac, Jose Maria Muta, Jose Antonio Soto, Marcelino Quashish, Josepha Quashish, and Juan Demati, defendants, wherein was drawn in question the construc-

b tion of a clause of the Constitution, or of a treaty, or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Allejandro Barker, Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasquez, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chante, Francisco Nauwila, Guadelupe Nauwila, Maria Ignacio Naurila, Jose Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, Jose Blacktooth, Inez Blacktooth, Salvador Changagash, Tomasa Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isadora Pena, Jose Maria Chavez, Pasquel Peloat, Francisca Peloat, Jose Juan Oulingawish, Cecelio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpia Rodrigez, Francisco Nawilot, Anastasia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Sawivel, Francisca Chutnicat, Silverio Nolasquez, Jose Antonia Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecelio Chiporosa, Francisco Loss, Jose Cecilio, Salvador Gorra, Publicate

Logrede, Jose Meechao, Concenciona Meechao, Valentin Meechao, Jose Maria Muta, Jose Antonio Soto, Marcelino Quashish, Josefa Quashish, and Juan Demati, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of November, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.]

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States for the Northern District of California.
By W. B. BEAIZLEY,
Deputy Clerk.

The foregoing writ of error is hereby allowed; and the same having been directed to be taken by the Department of Justice of the United States, and the defendants in error having waived in writing all bond and consented that writ of error may operate as a supersedeas,

It is hereby ordered that no bond be required for the prosecution of said writ and that the same operate as a supersedeas.

W. H. BENTLEY,
Chief Justice of the Supreme Court of the State of California.

1 (Indorsed:) L. A. 490. In the Supreme Court of the United States. Allejandro Barker et al., plaintiffs in error, v. J. Downey Harvey, administrator, et al., defendants in error. (Original.) Writ of error and supersedeas. Filed Nov. 18, 1899. Geo. W. Root, clerk. By A. W. Johnson, deputy.

2 In the supreme court of the State of California, from the superior court of San Diego county. Torrence, judge.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE estate of John G. Downey, deceased (substituted for John G. Downey), and the Merchants Exchange Bank of San Francisco, a corporation, plaintiffs and respondents,
vs.
ALLEJANDRO BARKER ET AL., DEFENDANTS and appellants.
} L. A. No. 490.

Transcript on appeal.

WHITE & MONROE,
Attorneys for Plaintiff and Respondent.
SHIRLEY C. WARD &
FRANK D. LEWIS,
Attorneys for Defendants and Appellants.

Filed December 3rd, 1897.

T. H. WARD, *Clerk*,
By F. C. WOODBURY, *Deputy*.

3 In the superior court of the county of San Diego, State of California.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE estate of John G. Downey, deceased (substituted for John G. Downey), and the Merchants' Exchange Bank of San Francisco, a corporation, plaintiffs,
vs.
ALLEJANDRO BARKER ET AL., DEFENDANTS.

Amended complaint.

Now come the plaintiffs, by leave of the court first had and obtained, and for cause of complaint against the defendants, allege:

I.

That the defendants above named are Indians and half-breed Indians, and that the defendants, Allejandro Barker, Vicente, José, Juan, Leon, Moro, Ambrosio, Chelo, Cenon, Salvario, Salvador, Ramon, Adolfo,
4 Capitan Matias, Leonardo, Pedro, Ramon, Chanate, Dolores, Francisco, José Celis, Calabaso, José Churo, Pedro Pablo, Jackateen, Joe, Salvador, sr., José, Juan Damati, Jesus, Adolfo, jr., Cenon, José la Luz, José Beney, Patricio, Macelino, Maria, Capitan José, Valenteen, Angel Maria, José Maria, Antonio Cueva, Little Antonio Cueva, José Cueva, José Maria, Trankelino, Capitan Dolores, Felix, José Juan, and Manual, are, respectively, known by the names in this paragraph hereinbefore stated; that the true names of all the other defendants herein are unknown to plaintiffs, and they are therefore designated by the fictitious names specified in the caption of the original complaint; and plaintiffs pray that when their true names are ascertained that the same may be inserted herein instead of said ficticious names.

II.

That the above-named plaintiff, The Merchants' Exchange Bank of San Francisco, is, and at all times mentioned in this complaint was, a corporation duly organized and acting under the laws of the State of California.

III.

That the above-named plaintiffs are the owners in fee simple of all that tract of land situate in the county of San Diego, State of California, and more particularly described as follows, to wit: The Rancho San José del Valle being lot 37, township nine (9) south, range 2 east; lot (37) thirty-seven, township ten (10) south, range two (2) east; lot thirty-eight (38), township ten south, range two east; lot thirty-seven (37), township ten

(10) south, range (3) east; lot thirty-seven (37), township ten (10) south, range four (4) east; lot thirty-seven (37), township eleven (11) south, range three (3) east; lot thirty-eight (38), township eleven (11) south, range four (4) east; all of San Bernardino Meridian, and being
5 the same land described in the patent of the United States to J. J. Warner, of date January 16, 1880.

IV.

That the above-named defendants are in the possession of portions of said tract of land, and that they and each of them claim an interest or estate therein, adverse to these plaintiffs; but these plaintiffs aver that the claims of said defendants, and each of them, are without any right whatever, and that the said defendants have not, nor has either of them any estate, right, title, or interest whatever in or to said land or premises, or any part thereof.

V.

That the plaintiff in this action assert and claim, and have ownership in fee simple, as aforesaid, to the lands and premises described in the complaint, under and by virtue of a patent issued to the predecessor in interest of these plaintiffs, on January 16th, 1880, by the United States of America, which said patent was so issued pursuant to the provisions of an act of the Congress of the United States, approved March 3d, A. D. 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and was founded upon a grant of the Government of Mexico. The plaintiffs' said claim and right to said land are protected and asserted under the laws of the United States and the stipulations and obligations of the treaty of Guadalupe Hidalgo, entered into by the Government of the United States and the Government of Mexico.

VI.

That on the first day of March, 1894, at the city of Los Angeles, county of Los Angeles, California, the said John G. Downey died intestate.

VII.

6 That on the 17th day of March, 1894, letters of administration upon the estate of the said John G. Downey were issued by the superior court of the county of Los Angeles, in this State, to the plaintiff, J. Downey Harvey.

VIII.

That said plaintiff thereupon duly qualified as such administrator and entered upon the discharge of the duties of his said office, and that said letters of administration have not been revoked.

Wherefore, plaintiffs pray:

First. That said defendants, and each of them, may be required to set forth the nature of their respective claims to said land, and that all adverse claims of said defendants thereto may be determined by a decree of this court.

Second. That by said decree it be declared and adjudged that the plaintiffs are the owners in fee of said lands and premises, and every part thereof, and that their title thereto is good and valid, and that the defendants have not, nor has either of them, any estate or interest therein, and that they and each of them be forever enjoined and debarred from asserting any claim whatever in or to said premises, or any part thereof, adverse to the plaintiffs.

Third. That plaintiffs may have a writ for the possession of said premises, as against the said defendants, and each of them, and for such other and further relief as to this honorable court may seem meet and agreeable to equity, and for costs.

WHITE & MONROE and
HUNSAKER & GOODRICH,
Attorneys for Plaintiffs.

(Endorsed:) Filed May 4, 1894.

7 [Title of court and cause.]

Answer.

Come now the defendants Alejandro Barker, Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasques, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chante, Francisco Nauwila, Guadalupe Nauwila, Maria Ignacio Nauwila, José Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, José Blacktooth, Inez Blacktooth, Salvador Changalagash, Tomasa Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Oulcot, Isidora Pena, José Maria Chavez, Pasquel Peloat, Francisca Peloat, José Juan Oulingawish, Cecilio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpio Rodrigez, Francisco Nawilot, Anastacia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, José Antonia Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecilio Chiporosa, Francisco Loss, José Cecilio, Salvador Gorra, Publicate Logrede, sued and served with summons herein either by their true names or by fictitious names, and for themselves and not for their codefendants and for answer to the complaint of plaintiff filed herein, deny and allege as follows:

I.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegation of the complaint that the Merchants' Exchange Bank of San Francisco is and at all times mentioned in the complaint was a corporation duly organized and existing under the laws of the State of California, and for such reason they
8 deny that the said Merchants' Exchange Bank of San Francisco is now or was at any of the times mentioned in the complaint a corporation duly organized and existing under the laws of the State of California, or under the laws of any other State, or at all.

II.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegation of the complaint that plaintiffs are the owners in fee simple of all of that tract of land described in Paragraph "III" of the complaint, and upon that ground they deny that plaintiffs, or either of them, are the owners in fee simple, or at all, of the lands and premises described in said Paragraph "III" of the complaint, or of any part thereof.

III.

They admit that these defendants are in the possession of portions of said tract of land described in Paragraph "III" of the complaint and admit that each of them claim an interest and estate therein adverse to these plaintiffs, but they deny that their claim, or that the claims of any of them, is without right, and deny that they, or any of them, have no estate, right, title, or interest whatever in or to said lands or premises, or any part thereof.

As a further and separate answer these defendants allege that they and their ancestors are now and were at the time of the acquisition by the United States from Mexico of the territory embraced within the State of California, and for many years prior thereto, Mission or Pueblo Indians, known and recognized as such under the laws of Spain, Mexico, and the United States; that at the time of the acquisition from the Mexican Government by the United States of the territory embraced within
9 the present State of California, and for more than thirty years prior thereto, these defendants and their ancestors were in the actual, peaceable, open, notorious, exclusive, and adverse possession, occupancy, and use of the following-described land, to wit:

Beginning at a point on the north boundary line of the Rancho San Jose del Valle in San Diego County, California, and north eighteen degrees, thirty minutes west, twenty-three and 9-100 chains from corner No. 23 of the official survey of said rancho; thence south sixty-five degrees west, one hundred and sixteen and 1-100 chains; thence north sixty degrees west, eighty chains; thence north thirty-one and ½ degrees west, fifty-two and 36-100 chains; thence north fifty-one degrees east, seventy-seven and 37-100 chains; thence north forty-six degrees east, forty-one and 66-100 chains; thence south fifty-seven degrees east, one hundred and twelve and 70-100 chains; thence south eighteen and ½ degrees east, fifty-four and 71-100 chains to the point of beginning, containing nineteen hundred and seven (1,907) acres.

That at all times hereinabove mentioned prior to the acquisition by the United States from Mexico of the territory embraced within the State of California, these defendants and their ancestors occupied and held such possession of said lands under and by virtue of the laws and regulations of the Mexican Government and under claim of right so to do; and were entitled by said laws and regulations to so use, occupy, and possess the same against all other parties whatsoever.

That the rights of these defendants and their ancestors to so occupy, use, and possess said lands were established and guaranteed by virtue of the laws and regulations of the Mexican Government in effect at all

times herein mentioned, prior to the acquisition by the United
10 States from Mexico of the territory now embraced within the State of California.

That these defendants, together with their ancestors, at all times since the acquisition by the United States from Mexico of the territory now embraced within the State of California, have been and remained in the continuous, open, notorious, actual, peaceable, exclusive, and adverse possession, occupancy, and use of all said lands as against all the world, and have acquired and now hold all the right, title, and interest so held and possessed by themselves and their ancestors, as aforesaid, prior to the acquisition by the United States from Mexico of such territory.

That in and by virtue of the treaty known as the "Treaty of Guadalupe Hidalgo," between the United States and the Mexican Republic and by virtue of the general law of nations, the United States recognized and stipulated to protect the rights and title of these defendants to the use, occupancy, and possession of said lands in the same manner as they and their ancestors had, under and by virtue of the Mexican laws and regulations, been entitled to possess and occupy the same.

That these defendants are now in equity the owners and against all the world are entitled to the possession, occupancy, and use of the said lands.

II.

That at the date of the grant or pretended grant by the Mexican Government, under which plaintiffs claim title to said lands and premises, they were occupied, possessed, and claimed by these defendants, their ancestors and predecessors, and that said lands were not vacant and unoccupied lands at such time, subject to private grant under the laws of Mexico.

That the said grant or pretended grant was made subject to and in subordination to the rights of these defendants, their ancestors
11 and predecessors, as aforesaid, to use, occupy, and possess said lands, and not otherwise.

III.

That by the confirmation of the grant under which plaintiffs claim and the issuing of the patent therefor the Government of the United States did not purport to give or to grant, and has not given or granted, any other or different title from that granted by the Mexican Government, to wit: a grant subject to and in subordination to the rights of these defendants, their ancestors and predecessors, to the lands and premises aforesaid, as hereinbefore stated, but that nevertheless said patent on its face purports to convey said lands and premises absolutely, and without regard to the rights and claims of the defendants, and without being subject or subordinate to their said rights or claims, as hereinbefore stated. The said patent is a cloud upon the title of these defendants, as aforesaid, to said land and premises.

Wherefore, these defendants pray that the plaintiff take nothing by this action, and that these defendants have judgment, that their right to the occupancy, use, and possession of said land and premises be decreed

to be prior and paramount to the said title of the plaintiffs; and that said patent be decreed to be subject and subordinate to their right to use, occupy, and possess said lands exclusively for their own use and benefit; and that they have such other and further relief as may be meet and proper, together with their costs in this behalf expended.

Now come the defendants, José Meechac, Concenciona Meechac, Valentin Meechac, José Maria Muta, José Antonia Soto, Marcelino Quashish, Josefa Quashish, sued and served with summons in this action under fictitious names, and for themselves and not for their codefend-
12 ants, and for answer to the complaint on file herein, deny and allege as follows:

I.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegation of the complaint that the Merchants' Exchange Bank of San Francisco is and at all times mentioned in the complaint was a corporation duly organized and existing under the laws of the State of California, and for such reason they deny that the said Merchants' Exchange Bank of San Francisco is now or was at any of the times mentioned in the complaint a corporation duly organized and existing under the laws of the State of California, or under the laws of any other State, or at all.

II.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegation of the complaint that plaintiffs are the owners in fee simple of all that tract of land described in paragraph "III" of the complaint, and upon that ground they deny that plaintiffs, or either of them, are the owners in fee simple, or at all, of the lands and premises described in said paragraph "III" of the complaint, or of any part thereof.

III.

They admit that these defendants are in the possession of portions of said tract of land described in paragraph "III" of the complaint, and admit that each of them claims an interest and estate therein adverse to these plaintiffs, but they deny that their claim, or that the claim of any of them, is without right, and deny that they, or any of them, have any estate, right, title, or interest whatever in or to said lands or premises, or any part thereof.

13 As a further and separate answer these defendants allege that they and their ancestors are now, and were at the time of the acquisition by the United States from Mexico of the territory embraced within the State of California and for many years prior thereto, Mission or Pueblo Indians, known and recognized as such under the laws of Spain, Mexico, and the United States. That at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the present State of California, and for more than thirty years prior thereto, these defendants and their ancestors were in

the actual, peaceable, open, notorious, exclusive, and adverse possession, occupancy, and use of the following-described land, to wit:

Beginning at granite rock 20x20x14 inches, marked "C—l," on the former site of an Indian hut on a high hill from which the northwest corner of the Indian cemetery bears south eleven degrees east, eleven and 56-100 chains—such Indian cemetery being the cemetery located in the old Indian village known as La Puerta de la Cruz—thence north eighty-eight and ½ degrees west, sixty-five and 60-100 chains; thence south forty-seven degrees east, sixty-two and 25-100 chains; thence south seventy-eight and ½ degrees east, twenty and 42-100 chains; thence north seventy-three and ½ degrees east, twenty-seven and 20-100 chains; thence north nineteen degrees west, twenty-six and 75-100 chains; thence N. 56° W. 20-75 chains, to the point of beginning; containing two hundred and sixty-six and forty-three one hundredths (266.43) acres.

That at all times hereinabove mentioned prior to the acquisition by the United States from Mexico of the territory embraced within the State of California, these defendants and their ancestors occupied and held such possession of said lands under and by virtue of the laws
14 and regulations of the Mexican Government and under claim of right so to do; and were entitled by said laws and regulations to so use, occupy, and possess the same against all other parties whatsover.

That the rights of these defendants and their ancestors to so occupy, use, and possess said lands were established and guaranteed by virtue of the laws and regulations of the Mexican Government in effect at all times herein mentioned, prior to the acquisition by the United States from Mexico of the territory now embraced within the State of California.

That these defendants, together with their ancestors, at all times since the acquisition by the United States from Mexico of the territory now embraced within the State of California, have been and remain in the continuous, open, notorious, actual, peaceable, exclusive, and adverse possession, occupancy, and use of all said lands as against all the world, and have acquired and now hold all the right, title, and interest so held and possessed by themselves and their ancestors, as aforesaid, prior to the acquisition by the United States from Mexico of such territory.

That in and by virtue of the treaty known as the "Treaty of Guadalupe Hidalgo," between the United States and the Mexican Republic and by virtue of the general law of nations, the United States recognized and stipulated to protect the rights and title of these defendants to the use, occupancy, and possession of said lands in the same manner as they and their ancestors had, under and by virtue of the Mexican laws and regulations, been entitled to possess and occupy the same.

That these defendants are now in equity the owners and against all the world are entitled to the possession, occupancy, and use of the said lands.

15 II.

That at the date of the grant or pretended grant by the Mexican Government, under which plaintiffs claim title to said lands and premises, they were occupied, possessed, and claimed by these defendants, their

ancestors and predecessors, and that said lands were not vacant and unoccupied lands at such time, subject to private grant under the laws of Mexico.

That the said grant or pretended grant was made subject to and in subordination to the rights of these defendants, their ancestors and predecessors, as aforesaid, to use, occupy, and possess said lands, and not otherwise.

III.

That by the confirmation of the grant under which plaintiffs claim, and the issuing of the patent therefor, the Government of the United States did not purport to give or to grant and has not given or granted any other or different title from that granted by the Mexican Government, to wit, a grant subject to and in subordination to the rights of these defendants, their ancestors and predecessors, to the lands and premises aforesaid, as hereinbefore stated, but that, nevertheless, said patent on its face purports to convey said lands and premises absolutely and without regard to the rights and claims of the defendants and without being subject or subordinate to their said rights or claims, as hereinbefore stated. The said patent is a cloud upon the title of these defendants, as aforesaid, to said land and premises.

Wherefore, these defendants pray that the plaintiff take nothing by this action and that these defendants have judgment that their right to the occupancy, use, and possession of said land and premises be decreed to be prior and paramount to the said title of the plaintiffs; and
16 that said patent be decreed to be subject and subordinate to their right to use, occupy, and possess said lands exclusively for their own use and benefit, and that they have such other and further relief as may be meet and proper, together with their costs in this behalf expended.

Now comes the defendant Juan Demati, and for himself and not for his codefendants, for answer to the complaint on file herein, denies and alleges as follows:

I.

That he has no knowledge, information, or belief upon the subject sufficient to enable him to answer the allegation of the complaint that the Merchants' Exchange Bank of San Francisco is and at all times mentioned in the complaint was a corporation duly organized and existing under the laws of the State of California, and for such reason he denies that the said Merchants' Exchange Bank of San Francisco is now or was at any of the times mentioned in the complaint a corporation duly organized and existing under the laws of the State of California, or under the laws of any other State, or at all.

II.

That he has no knowledge, information, or belief upon the subject sufficient to enable him to answer the allegation of the complaint that plaintiffs are the owners in fee simple of all of that tract of land described in Paragraph "III" of the complaint, and upon that ground he denies that plaintiffs, or either of them, are the owners in fee simple, or at all, of the lands and premises described in said Paragraph "III" of the complaint, or of any part thereof.

III.

He admits that these defendants are in the possession of portions of said tract of land described in Paragraph "III" of the complaint, and admits that each of them claims an interest and estate therein
17 adverse to these plaintiffs, but he denies that their claim, or that the claim of any of them, is without right, and denies that they, or any of them, have no estate, right, title, or interest whatever, in or to said lands or premises, or any part thereof.

As a further and separate answer, this defendant alleges that he and his ancestors are now and were at the time of the acquisition by the United States from Mexico of the territory embraced within the State of California, and for many years prior thereto, Mission or Pueblo Indians, known and recognized as such under the laws of Spain, Mexico, and the United States; that at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the present State of California, and for more than thirty years prior thereto, this defendant and his ancestors were in the actual, peaceable, open, notorious, exclusive, and adverse possession, occupancy, and use of the following described land, to wit:

Beginning at station No. 24 of the official survey of the Rancho San José del Valle, running thence north, fifty-seven degrees west, forty chains; thence south, thirty-three degrees west, thirty chains; thence south, fifty-seven degrees east, forty chains; thence north, thirty-three degrees east, thirty chains to place of beginning; containing one hundred and twenty (120) acres.

That at all times hereinabove mentioned prior to the acquisition by the United States from Mexico of the territory embraced within the State of California this defendant and his ancestors occupied and held such possessions of said lands under and by virtue of the laws and regulations of the Mexican Government and under claim of right so to do; and were entitled by said laws and regulations to so use, occupy, and possess the same against all other parties whatsoever.

18 That the rights of this defendant and his ancestors to so occupy, use, and possess said lands were established and guaranteed by virtue of the laws and regulations of the Mexican Government in effect at all times herein mentioned, prior to the acquisition by the United States from Mexico of the territory now embraced within the State of California.

That this defendant, together with his ancestors, at all times since the acquisition by the United States from Mexico of the territory now embraced within the State of California, has been and remains in the continuous, open, notorious, actual, peaceable, exclusive, and adverse possession, occupancy, and use of all said lands as against all the world and has acquired and now holds all the right, title, and interest so held and possessed by him and his ancestors, as aforesaid, prior to the acquisition by the United States from Mexico of such territory.

That in and by virtue of the treaty known as the "Treaty of Guadalupe Hidalgo," between the United States and the Mexican Republic and by virtue of the general law of nations, the United States recognized and stipulated to protect the rights and title of this defendant to the use, occupancy, and possession of said lands in the same manner as he and his

ancestors had, under and by virtue of the Mexican laws and regulations, been entitled to possess and occupy the same.

That this defendant is now in equity the owner and against all the world is entitled to the possession, occupancy, and use of the said lands.

II.

That at the date of the grant or pretended grant by the Mexican Government, under which plaintiffs claim title to said lands and premises, they were occupied, possessed, and claimed by this defendant, his
19 ancestors and predecessors, and that said lands were not vacant and unoccupied lands at such time, subject to private grant under the laws of Mexico.

That the said grant or pretended grant was made subject to and in subordination to the rights of this defendant, his ancestors and predecessors, as aforesaid, to use, occupy, and possess said lands, and not otherwise.

III.

That by the confirmation of the grant under which plaintiffs claim, and the issuing of the patent therefor, the Government of the United States did not purport to give or to grant, and has not given or granted, any other or different title from that granted by the Mexican Government, to wit, a grant subject to and in subordination to the rights of this defendant, his ancestors and predecessors, to the lands and premises aforesaid, as hereinbefore stated, but that nevertheless said patent on its face purports to convey said lands and premises absolutely and without regard to the rights and claims of the defendant and without being subject or subordinate to his said rights or claims, as hereinbefore stated. The said patent is a cloud upon the title of this defendant, as aforesaid, to said land and premises.

Wherefore this defendant prays that the plaintiffs take nothing by this action, and that this defendant have judgment that his right to the occupancy, use, and possession of said land and premises be decreed to be prior and paramount to the said title of the plaintiffs; and that said patent be decreed to be subject and subordinate to his right to use, occupy, and possess said lands exclusively for his own use and benefit; and that he have such other and further relief as may be meet and proper, together with his costs in this behalf expended.

Now come the defendants Horatio N. Rust, Indian agent; Rufina Cueva, Antonio Cueva, José Cueva, Dolores Cueva, Angel Quilpe, Maria
20 Quilpe, Santornin Chapo, Cenon Chapo, José La Luz, Patricio Quajo, Binea Chapo, Feliz Wickonla, Maria Antonia Wickonla, Dominga Paliwish, Madalena Palawish, Acovo Paliwish, Maria Los Angeles Paliwish, served with summons in this action either under their true names or under fictitious names, and disclaim any interest, right, or title in or to the premises in controversy, and ask that the said action may be, as to them, dismissed with their costs.

FRANK D. LEWIS,
SHIRLEY C. WARD,
Attorneys for Defendants.

Duly verified.
(Endorsed:) Filed Dec. 23d, 1892.

[Title of court and cause.]

Findings.

This cause having been called regularly for trial before the court on the 14th day of November, 1896, and a jury trial having then been expressly and duly waived by the respective parties, Messrs. White & Monroe appeared as attorneys for plaintiff, and Shirley C. Ward and Frank D. Lewis, esqs., appeared as attorneys for defendants. Alejandro Barker, Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasques, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chanate, Francisco Nauwila, Guadalupe Nauwila, Maria Ignacio Nauwila, José Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, José Blacktooth, Inez Blacktooth, Salvador Changalagash, Tomaso Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isidora Pena, José Maria Chavez, Pasqual Peloat, Francisca Peloat, José Juan
21 Oulingawish, Cecilio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpio Rodrigez, Francisco Nawilot, Anastacia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, José Antonio Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecilio Chiporosa, Francisco Loss, José Cecilio, Salvador Gorra, Publicate Logrede, José Meechac, Concenciona Meechac, Valentin Meechac, José Maria Muta, José Antonio Soto, Marcelino Quashish, Josefa Quashish, and Juan Demati. And the said Shirley C. Ward and Frank D. Lewis also appeared and disclaimed for the following-named defendants: Horatio N. Rust, Indian agent; Rufina Cueva, Antonio Cueva, José Cueva, Dolores Cueva, Angel Quilpe, Maria Quilpe, Santornin Chapo, Cenon Chapo, José La Luz, Patricio Quajo, Binea Chapo, Feliz Wickonla, Maria Antonia Wickonla, Dominga Palawish, Madalena Palawish, Acovo Paliwish, and Maria Los Angeles Paliwish. And the court having heard the proofs of the respective parties and considered the same and the records and papers in the case, and the arguments of the respective attorneys therein, and the cause having been submitted to the court for its decision and by the court taken under advisement, the court now finds the following facts:

I.

That all of the said defendants last above are Indians and half-breed Indians.

II.

That the plaintiffs are the owners in fee simple of all of that tract of land situated in the county of San Diego, State of California, and more particularly described as follows, to wit:

The Rancho San José del Valle, being lot 37, township nine
22 (9) south, range two (2) east; lot (37) thirty-seven, township ten (10) south, range two (2) east; lot thirty-eight (38), township ten

south, range two east; lot thirty-seven (37), township ten (10) south, range three (3) east; lot thirty-seven (37), township ten (10) south, range four (4) east; lot thirty-seven (37), township eleven (11) south, range three (3) east; lot thirty-eight (38), township eleven (11) south, range four (4) east; all of San Bernardino meridian, and being the same land described in the patent of the United States to J. J. Warner, of date of January 16, 1880, recorded in book 2, pages 73–94, of patents, in office of recorder of San Diego, California.

III.

That the defendants first above named are in possession of portions of said tracts of land, and they and each of them claim an interest or estate therein adverse to the plaintiff, but that the claims of the defendants and each of them are without right, title, or interest whatever in or to said land or premises, or any part thereof.

IV.

That the plaintiffs have ownership in fee simple to the lands and premises described herein under and by virtue of said patent issued to their predecessor in interest, J. J. Warner, on January 16, 1880, by the United States of America, which said patent was so issued pursuant to the provisions of an act of the Congress of the United States, approved March 3, 1851, entitled "An act to ascertain and settle the private-land claims in the State of California," and was founded upon a grant of the Mexican Government, and the plaintiff's said ownership is protected and asserted under the laws of the United States and the stipulations and obligations of the Treaty of Guadalupe Hildalgo entered into by the Government of the United States and the Government of Mexico, and
23 the plaintiffs have succeeded by mesne conveyances to the interest of the patentee in said patent.

V.

That on the 1st day of March, 1894, at the city of Los Angeles, State of California, said John G. Downey died, and on the 17th day of March, 1894, letters of administration upon the estate of John G. Downey were issued by the superior court of the county of Los Angeles, in this State, to the plaintiff, J. Downey Harvey, and that said plaintiff thereupon duly qualified as such administrator, and entered upon the discharge of his said office, and so continued until the 26th day of July, 1895, when a will of said John G. Downey having been discovered, the said plaintiff was by said superior court of Los Angeles County, State of California, duly appointed administrator with the will annexed of the estate of John G. Downey, deceased, and that he thereupon duly qualified as such administrator with the will annexed, and entered upon the discharge of his said office, and that said letters of administration with the will annexed have not been revoked.

VI.

That said John G. Downey, in his lifetime and to the time of his death, and the said Merchants' Exchange Bank of San Francisco were the

owners in fee simple of all the lands herein described, and that during the lifetime of said John G. Downey he paid all the taxes of every kind that were levied or assessed upon any or all of said lands from the issuing of the patent until his death, and that since his death all taxes of every kind that have been levied or assessed upon said lands have been paid by the plaintiff herein; and that the defendants have not, nor has either of them, paid any taxes or any part thereof.

VII.

That the following-named defendants, to wit, Alejandro Barker,
24 Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasques, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cencioña Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chanate, Francisco Nauwila, Guadalupe Nauwila, Maria Ignacio Nauwila, José Blacktooth, Inez Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, José Blacktooth, Salvador Changalagash, Tomaso Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isadora Pena, José Maria Chavez, Pasqual Peloat, Francisca Peloat, José Juan Oulingawish, Cecilio Toshicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpio Rodrigez, Francisco Nawilot, Anastacia Nawilot, Maria Antonia Nawilot, Ambrosia Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, José Antonio Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuella Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecilio Chiporosa, Francisco Loss, José Cecilio, Salvador Gorra, and Publicate Logrede were not, nor was either of them, nor were the ancestors or ancestor of either of them at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the State of California, and for more than thirty years prior thereto, or at all, recognized as Mission or Pueblo Indians by the laws of Spain, Mexico, and the United States, and were not in the adverse possession, occupancy, or use of the following-described land, to wit:

Beginning at a point on the north boundary line of the Rancho San José del Valle in San Diego County, California, and north eighteen degrees thirty minutes west, twenty-three and 9-100 chains from corner No. 23 of the official survey of said rancho; thence south sixty-five
25 degrees west, one hundred and sixteen and 1-100 chains; thence north sixty degrees west, eighty chains; thence north thirty-one and ½ degrees west, fifty-two and 36-100 chains; thence north fifty-one degrees east, seventy-seven and 37-100 chains; thence north forty-six degrees east, forty-one and 66-100 chains; thence south fifty-seven degrees east, one hundred and twelve and 70-100 chains; thence south eighteen and ½ degrees east, fifty-four and 71-100 chains to the point of beginning; containing nineteen hundred and seven (1,907) acres, or of any portion of said land, which land is a portion of the land described in the complaint, and first herein described; and have never since that time been in the adverse possession, occupancy, or use of any or all of said land as against all the world, and have never acquired, and do not now hold, or have any right, title, or interest in said lands, or any part thereof; that they are not, nor is either of them, in equity or otherwise,

the owner or owners or entitled to the possession, occupancy, or use of said lands or any of them, but that the plaintiffs are entitled to the immediate possession of all of said lands.

VIII.

That the grant by the Mexican Government to the predecessors of the plaintiffs of the lands herein described was not made subject to or in subordination to the rights of said defendants, their ancestors or predecessors, or any of them, and no claim of any of said defendants, their ancestors or predecessors, to any of said lands was ever presented to the board of land commissioners of the State of California, as required by act of Congress.

IX.

That the following defendants, to wit, José Meechac, Concenciona Meechac, Valentin Meechac, José Maria Muta, José Antonio Soto, Marcelino Quashish, and Josafa Quashish were not, nor was
26 either of them, nor were the ancestors or ancestor of either of them, at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the State of California, and for more than thirty years prior thereto, or at all, recognized as Mission or Pueblo Indians by the laws of Spain, Mexico, and the United States, and were not in the adverse possession, occupancy, or use of the following-described land, to wit:

Beginning at a granite rock 20x14 inches, marked "C—l," on the former site of an Indian hut on a high hill from which the northwest corner of the Indian cemetery bears south eleven degrees east, eleven and 56-100 chains—such Indian cemetery being the cemetery located in the old Indian village known as La Puerta de la Cruz—thence north eighty-eight and ½ degrees west, sixty-five and 60-100 chains; thence south forty-seven degrees east, sixty-two and 25-100 chains; thence south seventy-eight and ½ degrees east, twenty and 42-100 chains; thence north seventy-three and ½ degrees east, twenty-seven and 20-100 chains; thence north nineteen degrees west, twenty-six and 75-100 chains; thence N. 56° W., 20.75 chains to the point of beginning; containing two hundred and sixty-six and forty-three one-hundredths (266.43) acres, or any portion of said land, which said land is a portion of the land described in the complaint, and first herein described; and have never since that time been in the adverse possession, occupancy, or use of any or all of said land as against all the world, and have never acquired, and do not now hold or have any right, title, or interest in said lands or any part thereof; that they are not, nor is either of them, in equity or otherwise, the owner or owners or entitled to the pos-
27 session, occupancy, or use of said lands or any of them, but that the plaintiffs are entitled to the immediate possession of all of said lands.

X.

That the grant by the Mexican Government to the predecessors of the plaintiffs of the lands herein described was not made subject to or in

subordination to the rights of said defendants, their ancestors or ancestors, or any of them, and no claim of any of said defendants, their ancestors or predecessors, to any of said lands, was ever presented to the board of land commissioners of the State of California, as required by act of Congress.

XI.

That the defendant Juan Demati was not nor was the ancestors or ancestor of said Juan Demati at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the State of California, and for more than thirty years prior thereto, or at all, recognized as Mission or Pueblo Indians by the laws of Spain, Mexico, or the United States, and were not in the adverse possession, occupancy, or use of the following-described land, to wit:

Beginning at station No. 24 of the official survey of the Rancho San José del Valle, running thence north, fifty-seven degrees west, forty chains; thence south, thirty-three degrees west, thirty chains; thence south, fifty-seven degrees east, forty chains; thence north, thirty-three degrees east, thirty chains to place of beginning, containing one hundred and twenty (120) acres, or of any portion of said land, which said land is a portion of the land described in the complaint, and first herein described; and have never since that time been in the adverse possession, occupancy, or use of any or all of said land as against all the world, and have never acquired and do not now hold or have any right, title,
28 or interest in said lands, or any part thereof; that they are not, nor is either of them, in equity or otherwise, the owner or owners, or entitled to the possession or occupancy or use of said lands or any of them, but that the plaintiffs are entitled to the immediate possession of all of said lands.

XII.

That the grant by the Mexican Government to the predecessors of the plaintiffs of the lands herein described was not made subject to or in subordination to the rights of said defendants, their ancestors or predecessors, or any of them, and no claim of any of said defendants, their ancestors or predecessors, to any of said lands was ever presented to the board of land commissioners of the State of California, as required by act of Congress.

XIII.

That the Merchants' Exchange Bank of San Francisco is now and at all times mentioned in the complaint was a corporation duly organized and acting under the laws of the State of California.

XIV.

That none of the defendants or their ancestors at any time prior to the acquisition of the United States from Mexico of the territory embraced within the State of California occupied or held any possession of any

of the lands described in the complaint or herein described, under or by virtue of the laws or regulations of the Government of Mexico or under claim of right so to do, and were not entitled by said laws and regulations to so use, occupy, or possess the same, against all or any parties whatsoever, and that no right to occupy, use, or possess said lands or any of them by any of said defendants or their ancestors was established or guaranteed by the laws and regulations of the Mexican Government at any time.

That the United States did not by the treaty of Guadalupe
29 Hidalgo, or by the general law of nations, recognize or stipulate to protect any right or title of the defendants, or any of them, to the use, occupancy, or possession of any of said lands in any manner whatever.

Plaintiffs have title to all of said lands by virtue of the patent herein referred to, and at the date of the grant mentioned in said patent all of said lands were subject to private grant under the laws of Mexico.

By the issuing of said patent and the confirmation of the grant therein mentioned the Government of the United States purported and intended to convey said lands and premises absolutely without regard to the rights or claims of any of said defendants, and without being subject or subordinate to any rights or claims of any of said defendants to any of said lands, and none of said defendants have or ever had any valid claim or right to any of said lands.

Said patent is not a cloud upon any title of any of said defendants.

Conclusions of law.

As conclusions of law from the foregoing facts the court now hereby finds and decides:

I.

That the plaintiffs are the owners in fee simple and entitled to the possession of all the lots, tracts, and parcels of land as the same are described in the complaint on file herein, as against the defendants, all and severally, and all persons claiming or to claim the same, or any part of said lands under them, the said defendants, or either of them; and that neither one of said defendants has any right, title, or interest in or to said lands or any part thereof.

II.

That the plaintiffs are entitled to a decree as prayed for in their
30 complaint to quiet their title to said land against said defendants and each of them, and all persons claiming or to claim the same or any part thereof under or through the said defendants, or either of them.

III.

That the plaintiffs are entitled to judgment for costs to be taxed herein against such defendants as answered herein contesting plaintiffs' rights in

said premises; and as to the other defendants who have answered, disclaiming, costs are not to be taxed.

And judgment is hereby ordered to be entered accordingly.

San Diego, Cal., December 29, 1896.

W. L. PIERCE,
Superior Judge.

(Endorsed:) Filed Dec. 29, 1896.

[Title of court and cause.]

Judgment.

This cause having been regularly called and tried by the court, and the findings of fact and concl'sions of law having been duly rendered by the court, which are now on file in this cause, wherein judgment was awarded in favor of J. Downey Harvey, administrator, with the will annexed, of the estate of John G. Downey, deceased, and the Merchants' Exchange Bank of San Francisco, plaintiffs, against all of the defendants, and for costs against such defendants only as have answered contesting plaintiffs' rights in the premises, on motion of Messrs. White & Monroe, plaintiffs' attorneys.

It is now, therefore, ordered, adjudged, and decreed that the plaintiffs have judgment as prayed for in their complaint herein against the defendants Alejandro Barker, Baleriana Barker, Angela Barker, Vincente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasques, Adolfo Moro, Sylvestra Moro, Domingo
31 Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chanate, Francisco Nauwila, Guadalupe Nauwila, Maria Ignacio Nauwila, Jose Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, Jose Blacktooth, Inez Blacktooth, Salvador Changalagash, Tomasa Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Oulcot, Isadora Pena, José Maria Chavez, Pasqual Peloat, Francisca Peloat, José Juan Oulingawish, Cecilio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpio Rodrigez, Francisco Nawilot, Anastacia Nawilot, Maria Antonio Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, José Antonio Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecilio Chiporosa, Francisco Loss, José Cecilio, Salvador Gorra, Publicate Logrede, José Meechac, Concenciona Meechac, Valentin Meechac, José Maria Muta, José Antonio Soto, Marcelino Quashish, Josefa Quashish, Juan Demati, Horatio N. Rust, Indian agent, Rufina Cueva, Antonio Cueva, José Cueva, Dolores Cueva, Angel Quilpe, Maria Quilpe, Santornin Chapo, Cenon Chapo, José La Luz, Patricio Quajo, Binca Chapo, Feliz Wickonla, Maria Antonio Wickonla, Dominga Paliwish, Madalena Paliwish, Acovo Paliwish and Maria Los Angeles Paliwish, and each and all of them; that all adverse claims of defendants, and each and all of them, and all persons claiming or to claim said premises or any part thereof through or under said defendants, or either of them, are hereby adjudged and decreed to be invalid and groundless; and that the plaintiffs be, and they are, hereby declared and adjudged to be the true and lawful owners of the lands

described in the complaint and hereinafter described, and every
32 part and parcel thereof, and that their title thereto is adjudged to be quieted against all claims, demands, or pretensions of defendants, or either of them, who are hereby perpetually estopped from setting up any claim thereto, or any part thereof.

Said premises are bounded and described as follows:

That tract of land situated in the county of San Diego, State of California, and more particularly described as follows, to wit:

The Rancho San José del Valle, being lot 37, township nine (9) south, range two (2) east; lot (37) thirty-seven, township ten (10) south, range two (2) east; lot thirty-eight (38), township ten (10) south, range two (2) east; lot thirty-seven (37), township ten (10) south, range three (3) east; lot thirty-seven (37), township ten (10) south, range four (4) east; lot thirty-seven (37), township eleven (11) south, range three (3) east; lot thirty-eight (38), township eleven (11) south, range four (4) east; all of San Bernardino Meridian, and being the same land described in the patent of the United States to J. J. Warner, of date January 16, 1880.

And it is further ordered, adjudged, and decreed that the plaintiffs do have and recover costs, hereby taxed at one hundred and eighty-four and 75-100 dollars, against all of the defendants other than those who have disclaimed herein.

San Diego, Cal., December 29, 1896.

W. L. PIERCE, *Superior Judge.*

(Endorsed:) Filed Dec. 29th, 1896.

33 [Title of court and cause.]

Statement on appeal.

This cause was duly tried upon the seventeenth day of July, 1893, before honorable George Puterbaugh, judge of department two of the superior court, San Diego County, California, sitting without a jury, a jury having been specially waived, the plaintiffs being represented upon such trial by Messrs. Stephen M. White, T. B. O'Brien, Hunsaker and Goodrich, and the defendants by Shirley C. Ward and Frank D. Lewis.

Plaintiffs introduced certain evidence, which it is conceded established the fact that the Merchants' National Bank of San Francisco, one of the plaintiffs, was then and at all times in the complaint mentioned a duly organized and existing corporation under the laws of the State of California.

Plaintiffs then introduced in evidence a patent of the United States of America to John J. Warner, of date January 16th, 1880, which patent, marked "Plaintiff's Exhibit 3," with the omissions noted, was in the words and figures following, to wit:

The United States of America to all to whom these presents shall come, greeting:

Whereas it appears from a duly authenticated transcript filed in the General Land Office of the United States, that pursuant to the provisions of the act of Congress approved the third day of March, A. D. one thousand eight hundred and fifty-one, entitled "an act to ascertain and

settle the private land claims in the State of California," J. J. Warner, as claimant, filed his petition on the thirty-first day of May, A. D. one thousand eight hundred and fifty-two, with the commissioners to ascertain and settle the private land claims in the State of California, sitting as a board in the city of San Francisco, in which petition
34 he claimed the confirmation of his title to a tract of land known as the "Valle de San José, and Agua Caliente," situate in the then county of San Diego, and State aforesaid, said claim being founded on two Mexican grants, the first made on the eighth day of June, A. D. one thousand eight hundred and forty, to José Antonio Pico, by Juan B. Alvarado, then constitutional governor of the department of the Californias, and the second made on the twenty-eighth day of November, A. D. one thousand eight hundred and forty-four to Juan José Warner, by Manual Micheltorena, then general of brigade of the Mexican army, adjutant-general of the same, governor-general commandant and inspector of the department of the Californias.

And whereas the board of land commissioners aforesaid, on the tenth day of October, A. D. one thousand eight hundred and fifty-four, rendered a decree of confirmation in favor of the claimant, the said J. J. Warner, which decree of decision having been taken by appeal to the district court of the United States for the southern district of California the said district court on the thirteenth day of February, A. D. one thousand eight hundred and fifty-six, in the cause entitled, "J. J. Warner, appellee, vs. The United States, appellants," rendered its decision, as follows, to wit:

This cause coming on to be heard on appeal from the final decision of the United States board of land commissioners to ascertain and settle the private land claims in the State of California, under an act of Congress approved March 3, 1851, on the transcript of the proceedings and decision of said board, and of the papers and evidence upon which said decision was founded. And it appearing to the court that the said transcript and the notice of appeal have been duly filed according to law, and counsel for the respective parties having been heard; it is
35 ordered, adjudged, and decreed that the said decision of said commissioners be affirmed; and it is further adjudged and decreed that the claim of the above-named appellee to the land as described in the grant is a good and valid claim, and it is ordered, adjudged, and decreed that the same be, and is hereby, confirmed. The land of which confirmation is hereby made is situate in the county of San Diego, and known as the valley of San José, and is bounded and described in the original grant and map to which it refers, copies of which grant and map are on file with the papers in this case as follows, to wit:

"On the east, by the entrance from San Felipe and the mountains; on the west, by the mountains and defile of Aguango; on the north, by the mountains, the southern limits being the canisal and the mountains, to the extent of six square leagues, provided said quantity of six square leagues be contained within the boundaries; but if there be a less quantity than six square leagues then the claim of appellee to such less quantity is hereby confirmed."

And therefore, on motion of P. Ord, attorney of the United States for the southern district of California, and on suggesting to the court that it

was not the intention of the United States to prosecute the appeal allowed in the aforesaid cause, the said district court, on the twenty-fourth day of February, anno Domini one thousand eight hundred and fifty-seven, ordered "that the order allowing an appeal in the said cause to the Supreme Court heretofore made be, and the same is hereby, vacated, and it is further ordered that the appellee have leave to proceed under the decree of this court heretofore rendered as a final decree." Whereby the proceedings of court upon title became final.

And whereas under the thirteenth section of said act of the third of March, anno Domini one thousand eight hundred and fifty-one,
36 and the supplemental legislation, and in accordance with the proceedings had pursuant to said act and supplemental legislation, there has been deposited in the General Land Office a return, with the descriptive notes and plat of the survey of the said claim, confirmed as aforesaid, authenticated by the signature of the surveyor-general for the State of California, which descriptive notes and plats of survey are in the words and figures as follows, to wit:

"U. S. SURVEYOR-GENERAL'S OFFICE,
"*San Francisco, Cal.*

"Under and by virtue of the provisions of the thirteenth section of the act of Congress of the third of March, 1851, entitled 'An act to ascertain and settle the private land claims in the State of California,' and of the twelfth section of an act of Congress approved on the thirty-first day of August, 1852, entitled 'An act making appropriations for the civil and diplomatic expenses of the Government for the year ending the thirtieth of June, 1853, and for other purposes,' and whereas the United States district court for the southern district of California rendered a decision whereby it recognized and confirmed the title and claim of J. J. Warner to the tract of land designated as 'Rancho San José del Valle,' as appears from the certified copy of the final decree of said district court, a copy of which is hereto annexed, the said tract of land was surveyed in conformity to the grant thereof and the said decision, and I hereby certify that the accompanying map is a true and accurate plat of the said tract of land as appears by the field notes of the survey thereof, made by William Minto, deputy surveyor, under the direction of this office, which having been examined and approved, remains of record therein, and are in the words and figures following, to wit:

(Here follows in patent field notes of survey, which are omitted,
37 owing to their great length; the patent map is also omitted. It is admitted, however, that such description and map includes the northern half of the valley of San José, including the premises here in controversy, the southern half of the valley having been patented to Silvestre Portillo, under an earlier grant from the Mexican Government, dated in 1836.)

"In testimony whereof I have hereunto signed my name officially, and caused my seal of office to be affixed, in the city of San Francisco, this twenty-sixth day of February, A. D. one thousand eight hundred and seventy-nine.

[SEAL.] "THEO. WAGNER,
"*U. S. Surveyor-General for California.*"

Now know ye, that the United States of America, in consideration of the premises and pursuant to the provisions of the act of Congress aforesaid, of third of March, anno Domini one thousand eight hundred and fifty-one, and the legislation supplemental thereto, have given and granted, and by these presents do give and grant, unto the said J. J. Warner, his heirs and assigns, the tract of land embraced and described in the foregoing survey, but with the stipulation that in virtue of the fifteenth section of the said act neither the confirmation of this said claim nor this patent shall affect the interests of third persons.

To have and to hold the said tract, with the appurtenances, unto the said J. J. Warner, his heirs and assigns forever, with the stipulation aforesaid.

In testimony whereof I, Rutherford B. Hayes, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this sixteenth day of January, in the year of our Lord one thousand eight hundred
38 and eighty, and of the independence of the United States the one hundred and fourth.

By the President:

R. B. HAYES.

By W. H. CROOK, *Secretary.*

[SEAL.]

S. W. CLARK,
Recorder of the General Land Office.

Recorded in vol. 11, pages 206 to 223, inclusive.

Recorded at the request of Wells, Fargo & Co., February twentieth (20th), A. D. 1880, at 10 o'clock a. m. D. A. Johnson county recorder.

After such patent was introduced in evidence it was stipulated by counsel that the plaintiff had succeeded by mesne conveyances to all the right, title, and interest of the patentee that passed by virtue of such patent, and it was further stipulated that plaintiffs had paid all taxes of every character that had ever been levied or assessed upon the premises in controversy since 1880.

Whereupon plaintiffs rested.

The defendants then offered in evidence duly certified copies of the complete original "expediente" in the Spanish language of the grant from Manuel Micheltoreno to J. J. Warner, dated November twenty-eighth, 1844, for the place known as "Valle de San José;" also a duly certified translation of such expediente in the English language; also duly certified copy of the complete original expediente of the grant made by Juan B. Alvarado to José Antonio Pico, dated June eighth, 1840, for the land known as "Agua Caliente" and translation thereof.

These expedientes and translations thereof were together marked as "Defendants' Exhibit A."

(For convenience of the court and counsel upon the trial of said cause it was stipulated that the printed copies of such expedientes contained
39 in the printed transcript on appeal in the old case of Gage vs. Downey, numbered in that court 14411, beginning at the top of page 67 of such printed transcript and continuing to the bottom of page 75 thereof, might be used in lieu of the exhibit offered by defendants.)

The following is a correct copy of the translation of such expedientes, as the same appear, both by defendants' "Exhibit A" and by the transcript on appeal, in the case of Gage vs. Downey.

YEAR 1844.

"Expediente" forwarded by the naturalized citizen, Juan J. Warner, in petition of the place known by the name "Valle San José."

MOST EXCELLENT SIR: Juan José Warner, resident of this department, and married to Anita Gale, father of family, before you and in accordance with law, appear and declare that since the year 1833 I have resided in the city of Los Angeles.

I am father of children born in this department, and being in want of a place on which to situate a very considerable number of stock, big and small, belonging to the children by marriage with my said wife, petition your excellency to have the goodness to grant to my said children in property the place known by name as "Valle San José," which is vacant, situated east of the pueblo of San Diego, and distant from said town about twenty leagues, surrounded by the mountain with entrance into San Felipe on the west of Temecula, on the north of Pala and west of Santa Ysabel, pledging myself to obtain an exact plan thereof for the use of the Government and of the assembly of the department.

And I hope there will be no objection in granting it and issuing the corresponding title thereto, provided that your excellency considers my children entitled to the favor which I petition for.

Wherefore, most respectfully, I pray you to be pleased to decree favorably, for which I will be most obliged, declaring that I proceed in good faith and everything else necessary.

JOHN JOSEPH WARNER.

Monterey, August 30, 1844.

GOVERNOR: The land which is petitioned for, it seems there is no objection to its being granted according to the information which I enclose from the Rev. P. F. Vincent Olivas, and from the judge of San Diego, Juan Marron. The petitioner is a naturalized citizen, and is a person of good qualities, so that if your excellency does not dispose otherwise you can accede to his petition.

MANUEL JIMENO.

Monterey, September 2, 1844.

(Same date.)

Extend to him the title, and I order that he be obliged to procure the plan thereof within four months from this date, and should he fail to comply with such obligation within said term, this title will be null and of no value.

So it is ordered and decreed.

MICHELTORENA.

In conformity with proceeding, decree, and proof thereof, I sign it on the same date and place.

JUAN JOSE WARNER.

The interested party, satisfied with the superior decree, will be obliged to present the plan within the appointed time, and meanwhile the same

interested party will be allowed to occupy the land, pledging himself to procure a document from the man in charge of San Luis Rey, stating the valuation of the property, which he will pay on the terms that the Government may dispose.

MANUEL JIMENO.

Monterey, September 6, 1844.

41 MONTEREY, *November 27, 1844.*

Seeing the petition in which this "expediente" begins the preceding information, I declare Juan J. Warner owner of the land he petitions for.

First justice of the peace of San Diego, with the object of applying for in property, the place by the name of "Valle San José," occupied formerly by Mission of San Diego, I pray you inform me about the following: If on this date it is abandoned, and the time it has been in such a state; whether it was abandoned on account of the many robberies on the part of the wild Indians; whether on this date the Mission of San Diego has any stock with which to occupy it. State the distance between the Mission, San Diego, and said place.

San Diego, 5, 1844.

Accept this common paper in the absence of the kind required.

JUAN JOSE WARNER.

OFFICE OF THE FIRST JUSTICE OF THE PEACE,
San Diego.

In view of the petition which the party interested remits to this office, I beg to state that the said "Valle San José" is, and has for the past two years been vacant and abandoned, without any goods nor cultivation on the part of San Diego; but said place belongs at the present time to the said mission, and at petitioner's request I sign this in San Diego.

August 6, 1844.

JUAN MA MARRON.

To the Most R. P. Vincent Olivas:

With the object of soliciting in property the place known by the name "Valle de San José," formerly occupied by the mission under your charge, I beg of you to be so *so* kind as to inform me if, at the present day, the Mission of San Diego does occupy the said land, and if not, how long since it has been abandoned.

JUAN J. WARNER.

San Diego, August 5, 1844.

42 The "Valley of San José" can be granted to the party who petitions for it, inasmuch as the Mission of San Diego, to whom it belonged, has no means sufficient to cultivate and occupy it, and it is not so necessary for the mission.

FR. VINCENT P. OLIVAS.

Mission of San Diego, August 5, 1844.

(Here appears a sketch or deseno describing the property petitioned for. The sketch includes the entire San José Valley, and includes the property in controversy.)

The citizen, Manuel Micheltorena, general of brigade of the Mexican army, adjutant-general of the same, governor-general, commander, and inspector of both Californias:

Whereas Juan José Warner, Mexican by naturalization, has petitioned for his own personal benefit, and that of his family, the land known by the name "Valle de San José," bounded on the east by the entrance into San Felipe and the mountain, on the west by the mountain and canyon of Aguanga; and on the north bounded by the mountain, and the boundaries on the south being the "Carrizo" and the mountain; having previously complied with the notices and investigations on such matters as prescribed by the laws and regulations, exercising the powers conferred on me in the name of the Mexican nation, I have resolved to grant him the said land, declaring it by these presents his property, subject to the approbation of the most excellent assembly of the department, and to the conditions following, to wit:

First. He will not be allowed to sell it, to alienate it, nor to mortgage it, to place it under bond, or to place it under any obligation, nor give it away.

Second. He will be allowed to fence it in, without interfer-
43 ence with the roads, and other usages, (servidumbres). He will hold it freely and exclusively, turning it to agriculture, or any other use he may please, and he shall build a house on it within one year, and live in it.

Third. He shall apply to the respective judge to give him judicial possession thereof, by virtue of this order, by which he shall mark out the boundaries whereon he shall place the stakes, some fruit and wild trees of some use or other.

Fourth. The land which is being granted consists of six leagues, more or less (seis sitios de ganado mayor) according to the respective map or plan. The judge who may give possession thereof shall have it surveyed according to law, leaving the residue (sobrante) to the nation for its use.

Fifth. Should he fail to comply with these conditions, he shall forfeit his right to the land, and it will be denounceable by another. Therefore I order that this present decree be to him his title, and holding it for good and valid notice thereof be entered into the respective books and be given to the interested party for his protection and other purposes.

Given in Monterey, on the twenty-eighth day of November, 1844.

Record of this concession is taken in the respective book, page 12, and following.

Most Excellent Governor:

Juan J. Warner, native of the United States of America, naturalized and resident of this department, before you appear and say: That in virtue of the title extended to me by the Government, granting me in property the "Valley San José" with the approbation of the most excellent assembly of the department, I herewith enclose the plan of the property, and authorized copy of the "expediente," that you may be pleased to pass it over to the most excellent assembly, for its approbation in case there
44 be no impediment, and I beg to remark that I can not forward the document from the person in charge of the San Luis Rey mission, in regard to the valuation of the property belonging to the said mission, and that if the Government does not dispose otherwise, you will please

appoint an expert on your part, and the interested party another, for its proper valuation.

I declare to proceed with what is necessary, etc. Praying your excellency to accept this common paper in the absence of what corresponds.

JUAN J. WARNER.

Los Angeles, May 12, 1845.

LOS ANGELES, *May 14, 1845.*

Report of this and other documents forwarded by the interested party being taken, all is transmitted to the commission on public lands.

PIO PICO, *President.*

AUGUSTIN OLVERA, *Secretary.*

SIR: The commission of public lands has examined with all possible care the "expediente" formed in consequence of the petition made by Juan J. Warner, on the thirtieth day of August of last year, about the place known by the name of "Valle de San José," which was granted to him, with title legally issued by the government of the department under date 28th November of said year, and it appearing from the said examination that the said concession in favor of Juan J. Warner was made in perfect conformity with what the laws prescribe on this particular, and that now it only remains for the interested party to comply with what the Government required of him, and to which he pledged himself, before obtaining the said title, to present a document from the person in charge of the San Luis Rey Mission, in which must be stated the valuation of the property situated on said place, whose value he shall pay according to the terms that the said government may determine. In view of this the commission submits to the deliberation of the honorable assembly the proposition that follows.

The concession is hereby approved in favor of Juan J. Warner, of the place named "Valle de San José," adjudicated in property by the government of this department, with title legally issued on the 28th day of November last, in conformity with what the law of the 18th of August, 1824, and the article 8 of the regulation of the 21st of November, 1828. The most excellent governor will please take the measures he may think proper, so that the valuation of the property situated on said place be made out, as well as the payment of its amount.

YGNACIO DEL VALLE.
NARCISO BOTELLO.

Hall of sessions, in the city of Los Angeles, May the 17th, 1845.

ANGELES, *May 21st, 1845.*

In session on this day, the honorable assembly has approved the proposition of the preceding report, ordering the present "expediente" to be returned to the most excellent governor for other purposes.

PIO PICO, *President.*
AUGUSTIN OLVERA, *Secretary.*

"Expediente" forwarded by José Antonio Pico, in the petition of the place named "Agua Caliente," 1840.

YEAR 1840.

Prefect of the Second District:

José Antonio Pico, lieutenant of the company named San Francisco, Mexican by birth, and serving at the present time in the army, by means of this petition in accordance with law, I appear and say, that having a hundred head of cattle in number I stand in need of a place on which to propagate the said quantity, which is all that now remains in my
46 possession, praying you to grant me the place "Agua Caliente" belonging to the Mission of San Luis Rey, since it is not needed by the said mission, having a house on it, and an orchard of little utility.

Wherefore, I pray you to be pleased to hurry up this my petition, as I request, for which consideration I shall ever be grateful.

Please accept this in common paper in the absence of the kind required.

JOSE ANTONIO PICO.

Pueblo de las Flores, January 7, 1840.

ANGELES, *January 21, 1840.*

Report of the justice of the peace in the port of San Diego, containing an application ordering that the interested party forward the corresponding plan of the place he mentions, and go soon to the administrator of the San Luis Rey mission, that he may also allege on his part what may be expedient.

TAPIA.
NARCISSO BOTELLO, *Secretary.*

SAN DIEGO, *April 7, 1840.*

In regard to the superior decree that precedes, dated 21st of January of this year, I state that the land "Agua Caliente" is the property of the San Luis Rey Mission, which has improvements, buildings and an orchard, from which derive their subsistence the Indians who live thereon, which is bounded by the property of Joaquin Ortega, and I believe it can be awarded to the interested party for being worthy, but without prejudice to the Indians, who from it derive their support.

This is all I have to say, etc.

JUAN MARIA OSUNA.

In view of the superior decree, I state that the place above mentioned, "Agua Caliente" belonging to this ex-mission, distant twenty
47 leagues, and which has on said place a place of worship, and agricultural lands, an orchard of small proportions, which is not of much utility to this ex-mission, it can be granted to the party interested, paying for the said place of worship and orchard, without molesting (prejudicar) the Indians, who live on said "Agua Caliente."

This is all I can say on the matter.

In the absence of the administrator,

ANDRES PICO.

San Luis Rey, April 8, 1840.

MONTEREY, *June 4, 1840.*

In view of the petition headed in this "Expediente," the report of the justice of the peace of San Diego, that the administrator of San Luis Rey, and that the prefect of the second district, together with everything else that was thought of, and in conformity with the laws

and regulations on the subject, I accord to the lieutenant, José Antonio Pico, the claim in the property of the place known by name of "Agua Caliente," comprised within San Luis Rey, bounded by the rancho of "San José Valley," by the boundary of the canyon of "Buena Vista," and by the mountain of "Palomar," pledging himself to pay for the place of worship and other improvements, which the Mission San Luis Rey may have on said place, and with the condition of not disturbing (prejudicar) the Indians that thereon may be established, and forward this order to the most excellent assembly for its approbation.

Juan B. Alvarado, constitutional governor of the department of both Californias; thus I order, decree, and sign.

ALVARADO.

(Here follows in expediente sketch and deseno, showing property granted, which includes the northern half of the San José Valley, and includes the property in controversy.)

48 *Political Prefect of the Second District:*

The citizen José Antonio Pico, lieutenant of the Stationiary Company of Cavalry Inaure, San Francisco, in accordance with law, appears and says: That having presented himself before that prefecture, under date of January 7th of this year, petitioning for the land named "Agua Caliente," in this petition was wanting the requisite on which it is based; and that, together with the Indians who live on the said place, I have taken these measures, for the Indians cede to me all the right to which they are entitled, simply because I go to settle alongside with them, to help them to take care of the few goods which they possess for their support. They praying through me for their emancipation, that so they may undertake with liberty their labors for the support and benefit of their families. In view of what has been said, I pray you to please accept this my petition, with my efforts and everything else that may be required.

I hope in your kindness that, well informed of this my representation, you will proceed as may be best, accepting this common paper in the absence of the kind required by law.

I declare to proceed in good faith, etc.

JOSE ANTONIO PICO.

Pueblo de Los Flores, April 9, 1840.

ANGELES, *April 11, 1840.*

Join to your preceding information, and together forward it to his excellency the governor of the department for his superior determination.

TAPIA.

NARCISCO BOTELLO, *Secretary.*

Most Excellent Governor:

The prefecture of this second district, with a full knowledge of the information and documents that precede, believes that the petition
49 of the party interested can be acceded to, if your excellency thinks proper, securing previously the due indemnity to the Mission San Luis Rey, and under the conditions expressed by the man in charge of said establishment.

TIBURCIO TAPIA.

NARCISO BOTELLO, *Secretary.*

Angeles, April 11, 1840.

Juan B. Alvarado, Constitutional Governor of the Department of both Californias:

Whereas José Antonio Pico has petitioned for his own personal benefit and that of his family the land known by the name of "Agua Caliente," bounded by the ranch of "San José Valley," with the boundary of the canyon of "Buena Vista," and by the mountains of "Palomar," having previously complied with the writs and investigations corresponding, as required by the laws and regulations, exercising the powers which are conferred on me in the name of the Mexican nation, I have resolved to grant to him the said place, subjecting himself to pay for the place of worship and other improvements that be there, belonging to the San Luis Rey Mission, and not molest (prejudicar) the Indians that thereon may be established, and to the approbation of the most excellent assembly of the department, and to the conditions following, to wit:

First. He is allowed to fence it in, without interfering with the roads, crossroads and other usages (servidumbres); he will possess it fully and exclusively, turning it to agricultural or any other use he may see fit, but within a year he shall construct a house thereon and live in it.

Second. When the property shall have been confirmed to him, he shall petition the respective judge to give him possession thereof, by virtue of this order, and shall mark out the boundaries on whose limits he shall fix the landmarks, some fruit and wild trees that may be of some utility.

Third. The land of which donation is hereby made is of the extent mentioned in the plan, which goes with the "expediente." The judge who should give possession thereof shall have it surveyed according to law, leaving the residue that may result to the nation for other purposes.

Fourth. If he should fail to comply with these conditions, he shall forfeit his title to the land, and it will be denounceable by another.

Therefore, I command that this present order be to him the title, and holding it for good and valid, a copy thereof be entered into the proper book, and given to the party interested for his protection and other purposes.

JUAN B. ALVARADO.
MANUEL JIMENO, *Secretary.*

Given at Monterey, on June 8th, 1840.

Record of this order is taken in the book of records on grant of public lands, page 2, Monterey date, etc., as above.

JIMENO.

Plaintiffs objected to the introduction of these expedientes and each of them and to the translations thereof, on the following grounds, as stated in the language of counsel:

"Mr. WHITE. These documents are objected to upon these grounds: In so far as the offer of the grant to Warner is concerned, it is objected to upon the ground that it is incompetent, immaterial, and irrelevant; that the patent is conclusive of the title in the patentee, and the successors in interest of the patentee; and that the antecedent proceedings and documents referred to have no bearing, and can in no manner affect the validity of the patent, or its adequacy as an instrument conveying title to the patentee.

51 In so far as the expediente with reference to the Pico grant is concerned, the same is objected to upon the ground that it is immaterial, incompetent and irrelevant, for the same specific reasons assigned with reference to the offer of the expediente in the case of Warner; and the additional objection is made in the case of Pico that the plaintiffs in this case claim under the patent to Warner that that patent is based, as shown upon its face, upon the grant made by Micheltoreno, Mexican governor of California, to J. J. Warner, and that the same cannot in any manner be affected, or influenced, or impaired, or controlled by any grant or assumed grant of the Mexican Government made to Pico; and, further, that in so far as it may appear that any grant was ever made to Pico, such grant never became effective; that it was never presented to the board of land commissioners of the State of California, as required by the act of Congress, never confirmed, and no patent ever issued thereon; that the board of land commissioners of the State of California confirmed the application of Warner and decreed that he was entitled to receive the patent thereon; that such proceedings were had as appears by the patent in the Warner case; that the United States district court confirmed the decree of the board of land commissioners; that, thereafter, an appeal having been taken to the United States Supreme Court by the Government of the United States from such order confirming the decree of the board of land commissioners, said appeal was dismissed, and the patent to Warner was issued, in virtue of the original decree of the board of land commissioners so confirmed by the United States district court.

I suggest that evidence may be submitted, subject to these objections, and the same considered when the case is finally submitted."

52 The COURT: "Objections noted. The court will reserve its ruling, and exception will be given the party against whom the ruling is made."

Upon the final decision of the cause, such objections to each of such expediente were sustained and exception granted to the defendants, which ruling defendants specify as error. (Error No. 1.)

Defendants then offered in evidence a duly certified copy of petition of J. J. Warner filed with the board of land commissioners "to settle private land claims in the State of California," asking confirmation of his title to the tracts of land known as "Agua Caliente" and "Valle de San José," filed and marked "Defendants' Exhibit B," which petition is in the language following:

"*Before the hon. commissioners on private land claims in the State of California.*

The petition of J. J. Warner respectfully represents that he claims by virtue of grants from the Mexican nation a tract of land in the country of San Diego in said State, known as the Valle de San José and Agua Caliente, as the same is described in the grants thereof and in the accompanying maps or disenos.

That so much of said land as is known as Agua Caliente was on the 8th day of June, 1840, granted to José Antonio Pico by Juan B. Alvarado, governor of California and authorized to grant lands in the name and on behalf of the Mexican nation; and the same has since become

vested in the present claimant. That the remainder of said tract was subsequently granted to this claimant by a decree of concession made on the 2nd day of September, 1844, by Manuel Micheltoreno, governor of California, and authorized to grant lands in the name and on behalf of the Mexican nation, and by a grant or patent therefor issued to said claimant by said Micheltoreno on the 28th day of November, 1844.

53 That the claimant went into possession of said land by virtue of said decree of concession, and of a decree or license accompanying the same authorizing him so to do, and that he has ever since continued in peaceable occupation and possession of the same, except when disturbed by the prevalence of war in the country or by the incursions of hostile Indians.

That said second-named grant was approved and confirmed to the claimant by an act of the departmental assembly of California, passed on the 17th day of June, 1845. The claimant has no knowledge whether said first-named grant has or not been so confirmed.

A copy of the said grant to José Antonio Pico and a copy of said grant to your petitioner are herewith filed and prayed to be taken as a part of this petition. The originals will be produced and proved as may be required. The other papers and documents relating thereto exist in the archives of the former governments of California in possession of the surveyor-general of the United States for the State of California.

The claimant relies on the above mentioned documentary evidence and will produce other proof should it be required by the board.

(Signed) J. J. WARNER.

(Endorsed:) No. 254. J. J. Warner, Valle de Sn. José, y Agua Caliente petition, filed in office May 31st, 1852. Geo. Fisher, Sec'y. Recorded in record of petitions, Vol. I, pages 121 and 122. Geo. Fisher, Sec'y."

To the introduction of this evidence plaintiffs objected upon the same grounds as stated to the introduction of defendants' Exhibit A; the objection was noted, but the evidence was received for the time being and ruling of the court was reserved upon the objection until the

54 decision of the cause, at which time the objection was sustained and an exception granted to defendants, which ruling defendants specify as error. (Error No. 2.)

(NOTE.—All the objections of the plaintiffs to this evidence and to all other evidence offered by defendants to which objection was made was stated at the time the evidence objected to was offered, but the ruling of the court was reserved until the final decision of the case, the evidence offered in the meantime being received, neither party objecting to such course. Such objections were, upon final decision of the case all sustained, and an exception in each case given to the defendants, each of which rulings defendants specify as error.)

The defendants then offered in evidence from the transcript of proceedings in case No. 254 in the old United States district court of southern California, in the case entitled J. J. Warner, claimant, vs. United States, for the place named Valle de San José and Agua Caliente, being the proceedings for confirmation of Warner's title to the lands in controversy before the board of land commissioners and the United States district

court, duly certified copies of the depositions taken at such time (June, 1853), of the following witnesses produced on behalf of the claimant J. J. Warner, being the depositions of John Foster, M. M. Sexton, and Augustus Harazthy, which depositions were marked "Defendants' Exhibit C."

The following is the substance of the depositions of such witnesses:

JOHN FOSTER testified as follows:

"My name is John Foster, age thirty-eight years, reside in San José, California; am acquainted with the ranch called 'Agua Caliente' in San Diego County, California. I know that José Antonio Pico had a
55 number of hands employed on that ranch making a vineyard to the extent of ten thousand vines. I passed over the ranch in 1833; the Indians were in possession at that time, and have been in possession ever since that time; the Indians have never been expelled from there that I know of. The next thing I knew Antonio Pico was in possession, as I understood, by a grant from the Government. The Indians I have referred to as occupying the ranch were Mission Indians; the same Indians were in the employment of Antonio Pico about 1840. I only know of the Indians being employed by Antonio Pico for the one purpose of setting out the vines. Pico's agent occupied the ranch until the lands were transferred, as I understand, to Juan Warner. While Warner lived on the ranch, I never visited it. I don't know the time when the possession changed from Pico to Warner. As a general thing, the grants were made with the condition that the Indians be permitted to remain there. The Mission Indians, to whom I have referred, were the only Indians established on the land."

M. M. SEXTON testified substantially as follows:

"My name is M. M. Sexton; my age, thirty-two years, and I reside in the county of San Diego. I know the ranch generally called 'Valle de San José,' or valley of San José, situated in the county of San Diego, about fifty-five miles in a northeasterly direction from San Diego; first knew it in February, 1850. It was then occupied by J. J. Warner; he had stock there. I was there afterwards, when he had about one hundred and eighty (180) head of cattle and from one hundred (100) to one hundred and fifty (150) horses; he had an adobe house and several outhouses and a corral on the place, and was living in the house with his family. He had some twenty-five acres under cultivation; there was a
56 vineyard on the place, formerly in dispute between Warner and the Indians, but now acknowledged by the Indians to belong to Warner.

"The vineyard was in that part of the rancho called 'Agua Caliente,' where there is a hot spring. There are ruins of large buildings at this place, formerly occupied by Indians for the mission of San Luis Rey, and erected by the mission, as I have been told and believe. These buildings were burnt about the month of December, 1851. The land is on the frontier, and I have never heard of any contesting claimant. It is called sometimes the 'Valle de San José' and sometimes 'Agua Caliente,' and by the Americans 'Warner's ranch.' Don't know the quantity of land. I lived about fifteen miles from Warner's. The Indians were troublesome to him; he was obliged to corral his stock at night, and they would

sometimes steal them from the corral. In the Indian outbreak in 1851, Warner had all his cattle taken away and never recovered but a small portion of them. His horses were at that time at another place and were not lost. At the present time he has horses on the place, in charge of the Indians, as I understand. There are two Indian rancherias, one at 'Agua Caliente,' where there are from one hundred (100) to one hundred and fifty (150) Indians; the other is on the southern portion of the rancho and is occupied by from fifty (50) to one hundred (100) Indians during the winter. There is still another rancheria on the rancho, near the mountain, containing some one hundred and forty (140) Indians during the winter. In the summer the Indians of these two latter places live in the mountains."

AUGUSTUS HARAZTHY testified substantially as follows:

"My name is Augustus Harazthy, and I reside in the county of San Francisco. I am acquainted with the Rancho Valle de San José y
57 Agua Caliente since December, 1849; at that time Mr. Warner was in possession. I knew him to be in possession for three years after December, 1849, and he is still in possession. During the period referred to I resided in the county where the said rancho is located, and was sheriff of that county; the ranch was assessed to him. He occupied the ranch by cultivating the same, and lived on it with his family till the Indians burned down his house in the revolution, which burning took place in November, 1851. The place was known by two names—one Valle de San José and the other Agua Caliente. On the San José there was a substantial, good adobe house, several corrals, and two large fields fenced, and some other outhouses of not much value. The improvements were new, about three years old from the time they were burnt, having been made in 1849 or 1850. In 1849, when I arrived there, there was only one shanty on the premises; it might have been built a year or so before; it looked new. The field at the house was made in 1850 or 1851. The field away from the house was made in 1849. I observed several fields; by whom I do not know; they were not fenced and not cultivated at that time. At Agua Caliente there was an old house which, from appearances, must have been very old. There was also a vineyard. During my whole stay in San Diego County he, the claimant, had one or more Indians in his employment. He employed Indians generally. The improvements to which I have referred are about three miles apart; that is, according to the Spanish saying, and I think they are five miles apart. Indians lived there, and applied to me, as sheriff, to keep Captain Warner from driving them off. The Indians continued to remain there, kept the grapes from the vineyard which Captain Warner claimed, and about November, 1851, the Indian
58 chief who resided at Agua Caliente came down, burnt the house, drove away the cattle which was on the San José. The Indians claimed Agua Caliente and the field which they cultivated. The cause of quarrel, as I understand it, between the Indians and Captain Warner, was that the Indians claimed the vineyard and Captain Warner claimed the vineyard. The dispute to which I have referred was with Antonio Gorra, who was afterwards shot, under sentence of court-mar*s*hal."

These depositions of Foster, Sexton, and Harazthy were objected to by plaintiffs on the following ground, as stated in the language of counsel, viz:

Mr. WHITE. "In addition to the objections already made, we add an objection to this offer that the depositions were not taken in the present cause; that that was a cause pending between parties other than those who are now before this court. And further, that the same appear to be mere extracts from the record of the trial, and appear to be declarations of witnesses as to the matters of fact which were determined at that time by the proper tribunal of the United States, and whose determination eventuated in the issuance of the patent referred to, and that the judgment of the tribunal established by law to pass upon the testimony of these various witnesses is conclusive upon this court, and that the patent itself is the final result of the deliberation and consideration of the matters referred to in these depositions, and the solution of which was within the jurisdiction of the land department issuing the patent and the court deciding that the patent should issue."

(Ruling upon this objection was reserved until the decision of the cause, neither party objecting to such course, and then sustained, exception being granted to defendants, such depositions being marked "Defendants' Exhibit C." This ruling defendants specify as error.) (Error No. 3.)

59 Defendants then offered in evidence for the purpose of showing further possession of the property in controversy by the Indians, field notes of the final survey of the exterior boundaries of the rancho of San José de Valle confirmed by the United States to J. J. Warner, such survey being made in July, 1859, by J. C. Hays, deputy United States surveyor and confirmed by the United States surveyor-general of California and by the district court, but subsequently set aside. It was not the survey as finally confirmed and upon which the patent was issued.

These field notes, after the conclusion of the description, contain the following statement:

"There are several Indian villages on this rancho were there are planted a large quantity of corn, pumpkins, grapes, and peaches."

Plaintiffs stated their objection to the introduction of such field notes, as follows:

Mr. WHITE. "Objected to upon the grounds assigned with reference to the first and second exhibits offered; and also upon the ground that it appears from the patent referred to that the survey in question was not adopted; and that the survey so made by the said John C. Hayes never reached a stage or condition when the same was effective or could be effective for the purpose of in any way affecting the title of any one to the lands in controversy; that the Hayes' survey so referred to in the exhibit offered is not to any extent connected with the claims made by the plaintiffs in this suit; and that such survey was rejected by the proper department of the Government of the United States, if in fact it was ever made, the patent showing that the description therein contained was based upon another survey, made at a later date." It was also objected that there was no foundation laid for it. It is necessary to show that the Hayes survey was approved in order to permit it to be introduced in evidence.

60 Counsel for defendants then stated that these field notes were not introduced to bind the plaintiff by its description, but merely for reference to the Indians' possession which they contain; whereupon Mr. White replied:

"If that is the object, it is objectionable because it is not the document admissible by law as record evidence of the facts, and it does not appear to be taken in the form of a deposition, or in any form which would bind the plaintiffs in this particular case.

Its admissions are simply the admissions of the individual who made a survey which was ineffectual, and never became a public record by reason of its failure to obtain final approval."

It was further objected to because it is mere hearsay evidence. The party is not a witness. Didn't make the declaration under oath; wasn't a party in interest, and his declarations could not bind either party to the suit. These field notes were introduced and filed and marked "Defendants' Exhibit B." The only portion thereof material to this controversy is the portion above quoted.

The ruling of the court upon such objection was reserved until the final decision of the case, neither party objecting to such course, and the objection was then sustained and an exception granted to defendants, which ruling defendants specify as error.

PHILIP CROSTHWAITE was sworn on behalf of defendants and testified as follows:

"My name is Philip Crosthwaite; am in my sixty-eighth year; live in Lower California; am acquainted with the location of Agua Caliente Indian village on Warner's ranch, in this county; have been there three times; was first there in 1850, when I was county treasurer and tax
61 collector of this county. The Indians at the Agua Caliente were assessed for their property, and I accompanied the assessor all over the property and went to the Agua Caliente. There were Indians residing there then; there were a number of Indian houses; I don't know how many; may be twenty-five or thirty, perhaps more; I can't remember, but there were quite a number of Indians living there."

The following question was asked the witness by counsel for defendants:

"Q. Were the Indians making any use of the lands of the Agua Caliente at that time?—A. Yes, sir."

Mr. WHITE. "Objected to on the grounds that it is immaterial, incompetent, and irrelevant; that the possession of the parties referred to by witness is immaterial in this case; that the patent of the United States Government controls any mere matter of possession, which might have been exercised in 1850 by the Indians, or any one else; that the patent can not be affected or controlled, varied or impaired by the oral declaration of the witness as to the possession of the parties who never made any attempt to perfect their possession, so that the same might ripen into title, and that the written evidence of the title, to wit, the patent, is controlling in this court as against the oral declaration of the Indians and this witness, and furthermore that if it is attempted to establish any ancient right, if any such thing there be, the condition of affairs in 1850 is immaterial."

The COURT. The question may be answered, ruling and exception reserved.

A. They were, sir.

At the time of the decision of the case, such objection was sustained by the court, and an exception granted to the defendants, which ruling defendants specify as error. (Error No. 4.)

62 Mr. WHITE. "I presume we might stipulate that the questions put to the witness, unless otherwise specified, are subject to the objections already made."

Mr. WARD. "I think we might stipulate that this is in, subject to your objection from now on to the close of the case; I think that general objection might be considered in all along."

Mr. WHITE. "Very well, if that is satisfactory to the court."

The COURT. "It is so considered; the ruling will be reserved and exception allowed to the party who may be ruled against."

(At the time of deciding the case, the court sustained such objection, and granted an exception to the defendants and ruled that all similar objections of plaintiffs which were considered as being interposed to all of the defendants' oral testimony were sustained and exceptions granted to the defendants, which rulings defendants specify as error. (Error No. 5, applying the courts ruling out all defendants' testimony.)

The witness, Philip Crosthwaite, after the stipulation that such objections should apply to all of his testimony, testified as follows, in response to the questions asked him:

"In 1850, besides the Indians living at Agua Caliente, there were one or two Mexicans and an American named Bill Marshall; he was afterwards hung there; he was living with a squaw named Isabel, and there were one or two Mexicans living there at the Indian village with them. I was there again in 1851, accompanied by Don Augustus Harazthy. The Indians used the waters of the Agua Caliente springs for irrigating; they had their irrigating ditches and used the waters from the hot springs to irrigate—the irrigating ditches conveying the water to their planting grounds.

63 Cross-examination:

Mr. WHITE. "In all these matters of cross-examination it will be understood that if my objections to the testimony in chief are sustained the cross-examination will be withdrawn. I ask leave to make it contingent upon that, under the circumstances; I believe that is the usual rule."

The COURT. It may be so understood.

(At the time of deciding the case, the court having sustained all of plaintiffs' objections to defendants' testimony, plaintiffs' entire cross-examination of this witness, and his cross-examination of all other of defendants' witnesses, was by the court permitted to be withdrawn.) (Specification of error.)

The witness then proceeded to testify as follows, in response to questions on cross-examination:

"I can't possibly say how much land the Indians were cultivating or irrigating or using when I was first there; it was so long ago. The Indians all had small gardens; I don't think it would be more than an

acre or two in the largest of them; I don't think there was a hundred acres altogether; there could not have been, because the Indians all had very small gardens; they had no market for what they raised; they only just raised for their own use; everybody knows that the Indians of those days had very small gardens."

JOSEPH SWYCAFFER, sworn on behalf of defendants, testified as follows:

Subject to all the objections already interposed to defendants' testimony, which objections were sustained by the court, at the time the case was decided, and exception granted to defendants, which ruling defendants specified as error.

Direct examination:

"My name is Joseph Swycaffer; I reside at Lakeside; age seventy-three years. I am acquainted with the Agua Caliente Indian vil-
64 lage on Warner's ranch in this county. First knew it in 1851; there were Indians residing there at that time. I could not say definitely, but would judge there were at that time there equally as many as there are now, unless they have very recently increased. I was there last with the Indian commissioners about a year and a half ago. I think there were about as many there in 1851 as there were a year and a half ago. The Indians were then making use of the lands around the springs, like all Indian rancherias; they all had their cultivations; they used the waters always. I have known the village off and on since 1851. I have lived most of the time since 1851 here in Old Town, San Diego, and part of the time on my ranch at Bellena. I began living there about 1858. My family moved away from there about four years ago. I lived there from 1858 until four years ago. I saw the Indians at Agua Caliente—at intervals employed a good many of them. I don't think there are any of the old ones living there now that used to be there in 1851; there may be of the young ones. I remember some of them; some of my old hands are there yet—the hands that used to work for me. When I was there in 1851 I saw holes in the rock that had been ground out, and had apparently been used for a good many years. I saw evidences of houses and evidences of cultivation; saw Indians and their ponies and lots of evidence of animal life; saw little irrigating ditches. It was the spring when I was there and they were preparing for cultivating their lots. I have seen the place since 1851 so often—I could not begin to tell the number of times I have had to go there. Perhaps I have seen it a good many times in a year; often had to go there to make arrests; other times I had to go there to get men to work;
Indian labor was the only labor we had in early days in this coun-
65 try. I once went there with my knapsack on my back. That was in the winter of 1851 and 1852—the time the raid was made on Colonel Warner.

Cross-examination:

I have been in Arizona—went there first about 1854—was back and forth very frequently; sometimes I stayed a week; sometimes longer; took the mail from here to Yuma—couldn't tell how often I went—every month or so from here to Yuma. I went to Arizona again in 1877; was

there about ten years then; was at Agua Caliente about eighteen months ago, and again about four years before that time; only stayed there a short time—perhaps an hour. I can't recollect when, prior to four years ago, I was there. I lived eighteen (18) miles from there and used to be there frequently; prior to that time I was over there with a man to see if he could not buy those springs from the Indians; his name was Gardiner, from the upper country; that was about five years ago. I was at the village in '77; I can't recollect how often I was there between '55 and '77, but I was there oftener than every five years, but I could not tell how often—whenever I wanted hands. When I went there as a soldier it was to fight the Agua Caliente Indians that had committed depredations—burned Warner's ranch and killed a lot of people. We got the Indians into a deep canyon, and had the Coahuilla Indian battle. We killed a few of them—shot a few; we shot four captains at the stake; I don't say that they were Agua Calientes; it was the Agua Calientes that were raising this fuss; we killed the Indians, and we certainly shot the right men; it's always the right ones."

ADOLFO MORO, sworn and examined, through the interpreter, interpreting from Spanish into English, testified as follows on behalf of the defendants:

66 "My name is Adolfo Moro; I live at the Agua Caliente Indian village, on Warner's ranch; don't remember the number of years I have lived there; I can not tell, because I am very old. I came there when I was very young. I don't know where I was born; I was raised by old man Carilla. I was not married at the time I came to Agua Caliente. After I came to the Agua Caliente I got married, and lived at the Agua Caliente now. My wife is a native of the Agua Caliente, and was born there; her father was there. I have six children now; I have two grown ones—one of them is captain of the Agua Caliente village; he is the one that commands us all now. There were more Indians at the Agua Caliente when I came than there are now. The Indians did not have as large crops then as now. They had some crops, and the balance they used for pasture and wood. The Indians made their living by sowing a little corn and pumpkins and whatever we had. They lived on some kind of wild seeds from the forests; there is a kind of seed called cholla and cuijota; another root they ate is called mescal and acorns and chillas; these things used to grow right around there where we lived. The Indians have used the waters of Augua Caliente ever since I have been there to irrigate their crops and also to bathe in. There have never been any white persons there having control of the springs except the Indians and my own father-in-law. He built two or three bath houses there so they could bathe in; now they have good houses there. They charge the white people for bathing there. Governor Downey has been there to take baths and paid me for them.

Alejandro Barker has bath houses there too. In early times the Indians, for meats, lived on jack rabbits and rats.

67 Cross-examination:

These bath houses were built there years ago by my deceased father-in-law. There are eight bath houses there now. I don't know

how many feet; I think just large enough for a Christian to walk in there standing. Don't know what tribe of Indians I came from. Mr. Carilla told me he brought me from Sacramento. I was very small when I came to Agua Caliente; after I came to the ranch and had a little knowledge, I could remember."

SILVESTRA MORO, a witness on behalf of the defendants, sworn and examined through the interpreter, testified as follows:

"I live at the Agua Caliente village, on Warner's ranch; I was born and raised there; am the wife of Adolfo Moro. There were a great many more Indians at Agua Caliente when I was a little child than now—many more old ones than young ones. When I was a little girl the Indians lived on seeds that used to grow there. We have some of them here now to show you, and also some of the mortars that we used to grind our seed with there at the Agua Caliente; we have several of them to show you. We did not bring the stones here—they are there at the Agua Caliente—on those flat rocks, where we used to go and pound the acorns and seeds. My mother has got some of the wild seeds that we used to live on. When I was a little girl the Indians used to cultivate, but not as much as they do now. These wild seeds that they used to live on grew right there at the Agua Caliente, where we are now living. When I was a little girl the Indians had stock and horses and cattle and sheep and goats; my father had a few goats and a few sheep and a few horses and some cows and some bath houses. They then used the waters of the Agua Caliente to do their washing and to bathe
68 in, and to soak their acorns, which are very bitter; they washed them to take the bitterness out, and besides to irrigate their crops that they had in cultivation. Do not know how old I am; I was raised there and got married there, and have been living there all my life."

MACHOLA MORO, a witness on behalf of the defendants, sworn and examined through the interpreter, testified as follows:

(All of the testimony of this witness, as well as that of the three preceding witnesses, was given subject to plaintiffs' objections heretofore stated, which objections were sustained at the time of the decision and exception given to the defendants, which ruling defendants specify as error.)

"I live at Agua Caliente, on Warner's ranch, right at the hot springs; I was born and raised right there. I am the mother of Silvestro Moro, the wife of Adolfo Moro. I remember when Juan Largo came to live on the ranch.

(It was stipulated that Juan Largo was Colonel J. J. Warner.)

"I was about half-grown woman then. There were as many Indians living at Agua Caliente village then as now—a little more then than now—more old people then than now. The Indians then used to live a good deal on acorns and lots of other stuff that grows around the hot springs there—grasses and cactus and one thing and another; lots of Indian names—acorns and chollas and islayas and some kind of wild cherries. Here are some of the different seeds we used to use. (Witness opens package and shows various kinds of seeds of wild grasses, fragments of cactus, and various other products of the soil and seeds that they lived upon there.) We got the seed and pounded it on the rocks and put some

hot water on it and took the bitterness out of it, and made a kind
69 of mush. My husband was José Maria Moro; he was the captain of the Agua Caliente village; had control over the people that lived there, and advised them to keep quiet and work—was captain a long time. The Indians had cultivation at Agua Caliente when I was a little girl, and my husband used to cultivate land. They didn't farm as much as they do now, because they had nothing to work with. They worked by a small stick with a little piece of iron on top of it and plowed with it by horseback from the horn of the saddle. Didn't farm much, but farmed a little wheat and beans and corn and one thing and another—pumpkins and watermelons. The Indians used the water of the Agua Caliente to irrigate their crops and used it for bathing, and used it to take the bitterness out of the acorns, and they used it all the time. In those early times there were some fruit tress at Agua Caliente. Antonio Gara had an orchard a little higher up, and another one a little higher up above the springs. My husband had an orchard above the springs; it was planted by his father. When my husband died he left his right to his son and from that on. He planted some few trees after the old man died—the father of my husband. I remember when the men were kind of broken up, the priests were coming along there and we had church sometimes and prayed there; whenever the priests got there we went to the church and prayed. The priest never lived there; he came from some place else. The church was a kind of corral—all around it there and big houses all around it, but there was a cross right in the middle, where the church house is now—right there standing up. It was not really a church house, but a big house where they kept the grain—a kind of grain house; they moved the grain and one thing and another, and then would have the church inside sometimes; they brought their chil-
70 dren and had church where the cross was. The big house for keeping grain in was built by some of the men who lived right there at the hot springs, under orders from the priests; the Indian men, women, and children all worked on it and built the house. I was never at San Luis Rey Mission while the priest had charge of it."

Cross-examination:

"I remember when Juan Largo left the ranch. I was not there when the Indians drove him away, but I heard a kind of talk about it. He was having some trouble at that time. My husband used to go and work in the upper country there and I was with him, and when we came back it was just about the time of the trouble. My husband didn't work for anybody; he was a kind of shoemaker. He used to hunt a good deal, and kill deer and make buckskin, and made these leathers; he died off there, while he was in the upper country; that is, at El Monte. I was never at Los Angeles, or San Gabriel Mission. The only time I was away was when we went to work there at El Monte. My daughter, Silvestra, was then born—a little bit of a girl; she was able to walk around a little, but I was still nursing her. The Indians at Agua Caliente cultivate a good deal more land now than when Juan Largo came there, because they are able to do it; they have the tools to work with, and they have got grain and horses and one thing and another to work with. They farm a little more now, but they have not been taking up any more land; they have been working right inside of where they have always been;

they have been using it for one thing and another—for pasture and one thing and another; their land is fenced; not long ago they got wire and got their fields fenced; before that they fenced it with brush; the wire fence is about the same place as the brush fence was; some places
71 the wire fence is inside of where the brush fence was, but it's about the same. We have now fenced in the lands we used to cultivate and use. Some of the land outside where the line runs now was left out. Wire fences were put up by the grandchildren there and the daughter; they fenced their own field. We put the fence up first. All the lands that the Indians used to use at the time Juan Largo came there are all fenced in; in some places they got some land that ain't fenced in, but they used it for pasture and one thing and another—to get wood, or cut poles, or something like that. Some of the lands we used to use for getting our food on, when Juan Largo came; there it is open in places where we have our farms; wheat and corn is all fenced, but outside where we have got our acorns and one thing and another, that is not fenced, but they are using it always the same. No white man has used or controlled our lands or the lands we have fenced at Agua Caliente, or controlled the waters of the springs since I can remember, but "Slim Jim" (Jim Walsh) was bothering us some; that was for a claim outside of the ranch. There are two or three kinds of acorns that we used to use growing right around the springs close, and some we had to go to the mountain to get."

The defendants here offered in evidence the depositions of José Maria Avilla, Ignacia Francisco de la Cruz Garcia, Pio Pico, and J. J. Warner, all witnesses on behalf of defendants, taken in pursuance of the stipulation attached to the depositions. These depositions were introduced subject to the plaintiffs' objections above referred to and were marked "Defendants' Exhibit G;" at the time of the decision of the case by the court, these objections were all sustained and defendants given an exception, which ruling defendants specify as error. (Specification of error.)

72 The following is the testimony of each of such witnesses, as appearing in such depositions:

Direct examination.

JOSÉ MARIA AVILLA: My name is José Maria Avilla; was born in March, 1820; am acquainted with the Rancho San José del Valle in San Diego County, in this State, and with the Agua Caliente Hot Springs thereon; first knew these springs in 1838.

(At this point in the taking of this deposition, it was stipulated that the parties may at the time of the trial interpose any objections being proper to the testimony of the witness, except as to the form of the interrogatory, and that such objection may be taken at the time of the trial with like force, as though taken at this time.)

Witness proceeds: "At that time there were Indians living at the Agua Caliente; these Indians were under the administration of the San Luis Rey Mission; families and small ones, there were more or less three hundred. There were Indian nuns there at the time. I saw these Indians again in 1846; they were living there permanently in houses; one very large adobe house; the balance were tulle houses; the houses were on one side of the Agua Caliente Creek. The house of the captain,

José Nocar, was right close to the vineyard on the other side; the vineyard was in the center of all, and the José Nocar house was close to the vineyard on the other side. The Indians lived on the wild things of the country; they killed deer and jack rabbit and other things, and they ate these oak nuts, and they had plenty of beans, and watermelons, and pumpkins, and chia; it is a seed that grows there; they take it and thrash it and eat it; it is a wild seed. The Indians had peaches and pear trees,
and right near the de la Porta Cruz—when you go out of the
73 valley, there is the Porta Cruz; that was not at the Agua Caliente; the Caliente lays there and the Porta Cruz lays there. (Indicating.) At the Agua Caliente the Indians had an orchard and a vineyard, and pear and fig and apple trees."

Cross-examination.

"Porta Cruz is very near the Agua Caliente; I can't say what was the distance—very close there; don't think it was as far as from here (Temple Block, Los Angeles) to East Los Angeles; it was that far, more or less—can't say exactly. The Americans took possession of this country in 1846; they first came in here then; the same year I was on Warner's ranch. The business that took me to Agua Caliente in 1846—I went there after some Indians that had killed some white people in San Diego. There was with us a good many people; of those living now, there is Dolores Sepulveda, Manuel Coronel, and Francisco Garcia; I don't remember anybody else. I have seen these gentlemen lately; have spoken to one of them in the last few weeks—to Francisco Garcia. I can name other events that have happened since 1846. I remember in 1847 when Antonio Avilla went to take charge of the ranch San Jacinto. In 1852–53, I was manager of Antonio Avilla's cattle. This is the year 1893. (Deposition taken July 10, 1893.) I stayed at Warner's ranch in 1846 about three days; was there again in 1867. In '67 I went there hunting horse thieves; they went through there with stolen property and stolen horses to Sonora. That was the main road to go to Sonora. I was living on my ranch here, when the Indians drove Colonel Warner off that ranch; I don't remember what year that was. Don Juan left there because he was afraid of the Indians and came here to Los Angeles. I don't remember within two or three years of what time that was. The
wild Indians were up from Chihuahua; they used to live right
74 down to the mouth of the Colorado River. I went to fight with those Indians in 1846. We went on beyond Warner's ranch on the other side of San Felipe to the Vallecitos; in two days we went up there and back. I was to Agua Caliente in 1838. Don Antonio Avilla and I were after horse thieves. We went clear up to the Vallecitos on that occasion. I have conversed with Francisco Garcia concerning my testimony here, and also with the attorney here (indicating Mr. Ward); talked with Garcia to-day—not before to-day. I don't recollect whether I was at Warner's ranch between 1846 and 1867—was not there after '67. The Indian nuns at Agua Caliente, when I was there, belonged to the San Luis Rey Mission. There were no priests there in 1838. The captain was in charge of them; José Nocar took charge of the Indians. I did not see the nuns there in 1846. I can't tell how far Agua Caliente is from where the San Luis Rey Mission was. I could go from one place

to the other, on a good horse, between sunrise and two o'clock. In 1867 I stayed at Agua Caliente two days. My home in 1838 was at Tejuata ranch, Los Angeles County. I have resided at that ranch all my life.

Re-direct examination.

"Stayed at Agua Caliente in 1838 two days and two nights. I knew the chief—José Nocar; my uncle and I were after the thieves, and the foreman, Nogales, gave an order to my uncle to ask for horses from José Nocar, and the Indians furnished us with horses so we could go right ahead after the thieves; we came back by Agua Caliente."

FRANCISCO IGNACIO DE LA CRUZ GARCIA, witness produced on behalf of defendants, testified as follows:

"My name is Francisco Ignacio de la Cruz Garcia; I am one hundred and twelve years old, and live in Los Angeles. I know the ranch San José del Valle in San Diego County, where the Hot
75 Springs are located. I knew that place in 1834. There were a good many Indians living there then, at Agua Caliente. After 1834, I used to go to Mexico two times a year, passing by the Agua Caliente; sometimes slept there. The Indians then lived in little tulle houses; they had some cattle; they lived on acorns and chia; they raised pumpkins, beans, and corn; there were over four hundred Indians there. They were Indians of the mission. There were little farms there; they had beans and vegetables and pumpkins and corn and so on, and lived in tulle houses. The mission furnished them with meat. After the missions, they had sheep belonging to the missions there. The sheep that the priests took charge of they took care of. These sheep belonged to the San Luis Rey Mission; the Indians took charge of them the whole way up to Pala. The captain killed sheep for us. I have not been to Agua Caliente for four years; I went through there in '86; I was there in 1868; I was there in 1846, when the war of San Pasqual took place, with a letter addressed to General Kearney; was not there between '46 and '68."

PIO PICO, a witness on behalf of defendants, was sworn, and testified as follows:

"My name is Pio Pico; I am ninety-three years old; live in the house of Mr. Warner in Los Angeles. I know the Agua Caliente Indian village and Warner's ranch in San Diego County; first knew it in 1820; there were Indians residing there then; such Indians were subject to the administration of the San Luis Rey Mission. I was administrator of that mission in 1835 up to 1840. I was not at Agua Caliente from 1820 to 1835; there were many Indians at Agua Caliente while I was administrator of the San Luis Rey Mission; maybe more than
76 one hundred. While I was administrator of the mission, I had a foreman at Agua Caliente village, who took oxen up there and put in their seeds on their farms, plowed for them, made a granary. The Indians lived there and worked under the charge of the foreman. I know nothing about the place after mission jurisdiction ceased; have never been there since 1840."

Cross-examination:

"I went there in 1820—took my mother and sister to the springs; my sister was sick and took her there for the benefit of the water to bathe in—the water to cure her. I am the Pio Pico who was the last Mexican governor of California."

J. J. WARNER, a witness on behalf of defendants, was sworn, and testified as follows:

"My name is J. J. Warner; my age eighty-five years; my residence is in Los Angeles County, California. I am the same J. J. Warner who received a grant of what is known as Warner's ranch in San Diego County, California, from the Mexican Government in 1844, but I thought the grant was in 1843. I first knew the Indian village of Agua Caliente, located on that ranch, in 1843; I saw the village frequently after 1843; there were Indians living there in 1843. These Indians were of the Coahuilla nationality, and they had been under the control of the Mission San Luis Rey. There must have been about ten families of Indians there at that time; their number increased both by aggregation and by births from that time until 1851, when I left the ranch as my place of residence. I was back there repeatedly until about 1860 and was over at the Agua Caliente village every time I went there. Between 1851 and 1853 there was some diminution of the Indians of the inhabitants at the village of Agua Caliente. The army officers of
the United States somewhat diminished the number by execu-
77 tion somewhere about 1851 and '52 and so did the civil and lynch
law cut off some of them. Their houses were burned and some moved away, but they generally returned after 1851. Those Indians made their living by going out on the ranches in San Diego and Los Angeles—principally in Los Angeles County—the males did and sometimes the females with them, and worked. When they returned they brought home some subsistence; they also gathered acorns and other things; they gathered grass seeds; they gathered some bulbous roots, and they planted some—a little corn and some beans, and had a few trees, from which they didn't get much good; they had a little fruit from them; they killed a good many rabbits, from which they got food; then they used to steal my sheep and sometimes my cattle; sometimes they bought a piece of beef from me. These Indians were never dispossessed from their places at Agua Caliente, that I ever heard of, from 1843 until the time I left there."

Cross-examination:

"When I spoke of the Indian population increasing by aggregation as well as by birth between 1843 and 1851, I meant the coming in of Indians belonging to that village, or that family of Indians, who had been dispersed in other parts of the country. I will explain: When the priestly authority over these Indians pretty much ceased at that time the able-bodied Indians at the Agua Caliente were nearly all at the San Luis Rey; the able-bodied males and females of the Agua Caliente were nearly all at San Luis Rey in 1831 from that time on, I don't know how much before that time; well, when the priestly authority pretty much ceased, the Indians dispersed in a great measure from the mission

and they went about the country seeking employment where they could find it—where they could get pay for their work, and some
78 returned to their villages. During the time that Father Parez managed the mission of San Luis Rey, a good many Indian villages of that mission were entirely withdrawn, and the village location became uninhabited."

(There was read to the witness various portions of papers constituting a part of the expediente of the grant to him from the Mexican Government, the provisions of which he recalled and recollected.)

Referring to his petition addressed to the Mexican authorities, asking for a grant to him of the Valle San José, the witness said:

"You see here is Agua Caliente and there is El Valle del San José. Now, El Valle del San José, so far as the mission of San Diego is concerned, had no connection with the Agua Caliente. When I wrote that petition, I was referring to the southern half of the San José valley; that is a geographical piece of land. I do not know where the lines of the Warner and Portilla grants are fixed. I remember a grant to José Antonio Pico. The land commissioners adjudged that my grant covered the Agua Caliente, the tract of land petitioned for by Pico."

Counsel for plaintiffs asked the following questions of the witness:

Q. The commission says among other things (referring to the opinion of the board of land commissioners concerning Warner's patent): "Two grants were presented and proved in this case; the first made by Juan B. Alvarado to José Antonio Pico on the 8th day of June, 1840; the other by Manuel Micheltoreno on the 28th of November, 1844, to the present claimant. The land embraced in the grant to Pico is designated by name Agua Caliente, and that described in the grant to Warner is called the Valle San José. On comparing the descriptions of the two parcels of land, and the map which constitutes a portion of the two expe-
79 dientes, it is manifest that the grant to Warner embraced the premises described in a previous grant to Pico."

Q. That is what I alluded to.—A. Yes, sir.

Q. You recollect that?—A. Yes, sir.

Q. That is true, is it?—A. That is true in regard to all that land being in the valley of San José.

Q. To continue, I am reading right along. The place known by the name of Agua Caliente constitutes the northern part of the valley by the name of San José, while the grant to Warner described the entire valley, and the witnesses testify that the grant made to Warner is known by these names, but more frequently it has recently been called Warner's rancho. The testimony shows that Pico had set out some vines on the place before the grant was made to him, and that he built a house on the place after the grant.

Q. Do you remember where those vines were?—A. Yes, sir; I remember seeing the vines, and was told by the Indians that Pico's man had planted there.

The witness then proceeds:

"All the vines were planted on a little plateau, the level land perhaps a little less than a quarter of a mile nearly west or southwest from the Agua Caliente Springs; southwest the hill upon which there had been an adobe building put up during the time of the mission. When I first

went to the ranch, there were two small vineyards within the Agua Caliente location, three or four hundred yards southwesterly from the Agua Caliente Springs and on the north side of the water that flowed from that spring southwesterly. I think there had been one or two thousand vines in each of the two vineyards. They were separated by a little narrow lane that ran between them. The southwesterly one was
claimed, occupied, and possessed by an Indian by the name of
80 Antonio Gara. The other one was claimed as common property
belonging to the mission—as community property belonging to the mission, in charge of José Nocar, an Indian. It was unfenced, and had been for a year or two unpruned. He told me that there was that vineyard that belonged to me; I must take care of it, and I had it fenced and pruned. Nocar was the chief. He was a man that had been in charge there, I think, by the mission. He had a little house on the south side of the stream—a little adobe house, with a little coral enclosing it. These vineyards were maintained as long as I knew anything about the ranch. I maintained the vineyard that I took possession of. I was driven off the ranch by the Indians in 1851 under the following circumstances: In the fall of 1851 I was warned by friendly Indians of the Valle de San José that some of the Indians of the Agua Caliente—Indians living in the mountains—Indians of the Coahuilla tribe, living in the mountains north and east of the Agua Caliente, were combining to make an attack upon me and my ranch. These warnings were repeated, and with such affirmation that, on a night some messengers were sent to me, I sent my family away from my residence in the valley of San José in the night, two days after which, or a day and a half after which, early one morning I was attacked by a large body of Indians of the Coahuilla nation, a number of whom were the Indians of the Agua Caliente. I fled away from my house after killing three Indians. I fled away and the Indians burned my house and drove my cattle off over the mountains. My family stayed away after that. I had some stock left on the ranch—some horses. I think I made the arrangement called for in the expediente in reference to the property. It was a mere nominal sum; I
don't remember; it was all arranged satisfactory to the mission."

81 Redirect examination:

In petitioning for my grant, I intended to include the whole valley, including Agua Caliente. I was alluding to the Valle de San José in my papers addressed to the parties in charge of the San Diego mission. About two-fifths of the valley, the southern part of it, had been occupied by the San Diego mission. The Agua Caliente village, however, is in the northern part of the valley, and was not included within the San Diego Mission jurisdiction. I can tell you historically about the Indian attack made upon me being incited by a white man. I have no personal knowledge of it, but can tell you historically. William Marshall, a white man, had so intrigued with those Indians at the Agua Caliente, that he led them, or a sufficient number of them, and controlled the whole village, so that on the night before they made the attack upon me, at my ranch, distance some three miles from the Agua Caliente, he had gone to the houses of the Indians, where white men were sleeping, and they had killed some five or six or seven white men, who were at that time at the village of Agua Caliente as invalids, or as assistants or

companions of invalids; so that it may be said that the whole village of men were led by Marshall, because they made no opposition, and it was only those Indians of Agua Caliente, so I was told, that went with Marshall and killed those invalids, and the Indians did the killing. They told me that Marshall stayed outside and told them to go in and do the killing; that he did not want to see their faces. He did not have any spite against them, but killed them so as not to have anything behind them in his attack on me. Some three and perhaps five of the Indians who made the attack upon me were sentenced by court-martial held at the cayote Indian village to be shot, and were shot by military com-
82 mand on the 28th of December, 1851. Subsequently Bill Marshall and a half-breed who was with him were hung by sentence of the county court at San Diego. Antonio Gara, who was the chief conspirator of the Indians at this outbreak, was executed, I believe, by command of General Bean. These Indians who were executed were all from the Agua Caliente village."

After such depositions were introduced in evidence, the following named parties, all old Indians, and defendants in this action, viz: Leonardo Aulingawish, Cecilio Chiporosa, Salvador Changalagash, Marcelino Sivimoat, and Anastacia Nawilot, were sworn on behalf of defendants, and testified through the interpreter, from Indian into English, as follows:

That they were born at the Agua Caliente Indian village on Warner's ranch; that they had lived there all their lives; that they were nearly grown when Colonel Warner first came on to the ranch; that they remembered when the American soldiers first came to the ranch; that there were as many or more Indians living at Agua Caliente village when they were children than there are now; that they have never been disturbed in their possession of the Agua Caliente; that the cultivation in early times, when Warner came on the ranch and before, by the Indians, was less than now; that the present cultivated fields include the old planting grounds, except in one or two places; that when Warner came on the ranch, and before, the Indians lived mostly on wild grass seeds, chilla and other seeds, acorns, wild cherries, tunas, mescal roots, rabbits, squirrels, and rats; that the Indians have always used the waters of the hot springs for irrigating, washing, bathing, and soaking acorns and other seeds, to take the bitter taste out of them.

And it was stipulated by counsel that the following named defendants, viz, Tomasa Nawilot, Sinin Sivimoat, Francisco Nawilot, José Black-
83 tooth, Isabel Aulingawish, Maria Ignacio Nawilot, Solidad Chatnicat and Manuella Sivimoat, are all old Indians and defendants in this case, and shall be considered to have testified on behalf of the defendants to the same effect as the Indians, Leonardo Aulingawish, Cecilio Chiporosa, Salvador Changalagash, Marcelina Sivimoat, and Anastacia Nawilot testified, as above stated.

In addition to the testimony of Leonardo Aulingawish and Cecilio Chiporosa, as above stated, they also testified that in early times, before Colonel Warner came to the ranch, the Indian village at Agua Caliente was under the charge of the priests of the San Luis Rey Mission; that the Indians worked the lands, but were told to do it by the priests, and that sometimes they took the crops that grew there down to the San Luis Rey Mission on pack animals; that they remember the lands used by the Indians and claimed by them at Agua Caliente before Colonel War-

ner came to the ranch; that they were the same lands the Indians are now using; that they showed the correct boundaries of such lands a year or two ago to Mr. Dorn, the surveyor; that the Indians have always used and claimed the lands they showed Dorn; that they cultivated that inside of their fences and used that outside of their fences and within the lines shown Dorn for pasture and for getting wood and gathering wild grass seeds for eating; that the Agua Caliente Indians drove Colonel Warner off the ranch because he was making some claim to the hot springs and the orchard.

Marselina Sivimoat, in addition to her testimony as above set forth, also testified that she remembered when the padres of the San Luis Rey Mission had charge of the Indians of Agua Caliente village; that she stayed at the San Luis Rey Mission when she was young, and
84 remained there until the mission broke up and the priests left; that the Indians farmed the land at the Agua Caliente, under orders from the padres, and took their grain down to the mission on pack mules.

All of the foregoing testimony, given by defendants, was introduced, subject to the plaintiffs' standing objections already interposed, as hereinbefore stated. The testimony was permitted to go in, and the ruling of the court upon such objections reserved, neither party objecting to such course, and at the time of deciding the case such objections were sustained, and exception granted to the defendants, each and all of which rulings defendants specify as error.

ALEJANDRO BARKER, one of the defendants, was introduced on behalf of the defendants and testified that he was one of the defendants; that he lived at Agua Caliente village, on Warners ranch, and was born and raised there; that he knew all the defendants in this action, and from his own knowledge, or from the local reputation in Agua Caliente village, he identified all the defendants who had not already testified, and who sat up any claim to the tract of land first described in defendants' answer, containing nineteen hundred and seven (1,907) acres (being the lands claimed by the Agua Caliente Indians) as being descendants either of the old Indians, who had already testified in the case on behalf of defendants, or of old Indians already dead, who had lived at Agua Caliente village; he further testified that all of the Indians of the Agua Caliente village had a few head of stock—may be altogether one hundred head of cattle—about forty head of horses and about forty or fifty head of sheep, and about the same number of goats; that their cattle and horses had been kept by the Indians outside of their fences and inside of the lines claimed by the Indians, that were shown
85 to Dorn; that the last few years the ranch men, under Governor Downey, had been taking up the Indian stock and corraling it whenever they found the stock outside the Indian fences and far down on the ranch, and making the Indians pay for it one dollar a head to have it released, and Governor Downey's stock has been pastured right up to the Indian fences, too, of late years.

This testimony of Barker's was given subject to the same objections already interposed by plaintiffs to defendants' other testimony, which objections at the time of the decision of the case were sustained and exception granted to the defendants, which ruling defendants specify as error.

E. L. DORN, sworn as witness on behalf of defendants, testified as follows:

"I am a surveyor. I have surveyed the Indian fields at Agua Caliente, and the lands around those fields that were shown me by the Indians as having been used and claimed by them in the early times. I made a map of that survey. (Map shown witness and he identifies it as being the map referred to.) I was engaged in making that survey in the summer of 1891, I think; was about two weeks at work on it; the map correctly shows the survey; I surveyed both the Indian fields in cultivation at that time, and the exterior boundaries of the entire tract claimed by them. That survey was made by me under the instruction of the United States board of Indian commissioners. I have both the field notes of the survey as to the lots and the exterior boundaries with me. (Map shown witness introduced by defendants in evidence, marked "Exhibit E." This map shows a tract of land, the exterior boundaries of which contain 1,907 acres, being the same tract of land first described in defendants' answer, and shows it to be located just inside the northern
86 boundary line of the Rancho San José del Valle, as patented, two of the boundary lines being also exterior boundary lines of the rancho, as patented. Inside of these exterior boundaries is shown a tract of land containing six hundred and thirty-three (633) acres, divided up into fifty small tracts, the dividing lines representing fence lines, and upon each tract the name of the Indian appears who was occupying the same. This 633 acres represents the fenced lands used by the Indians, defendants, under cultivation. This explanation of the map renders it unnecessary to insert the map here, or the field notes of the survey.)

The witness continues:

"I ascertained the separate lots located upon that map, which contain the different Indian names, by having the Indians go in a body to each piece of land with me, and show me the land, and give me the name of the person occupying it and using it. There is no one fence embracing all the fields; there are many separate fields fenced, but no general fence running around the entire cultivated fields, all adjoining each other. The yellow boundary line, intended to represent the exterior boundaries of the entire Indian claims, was made under the guidance of the Indians pointing out to me the lands they had claimed and been using. The Indians went with me and pointed out these lines that I ran; about twenty or thirty of them did; among them were the old Indians, Leonardo Aulingawish and Cecilio Chiporosa; they showed me what they claimed, where they wished to have their lines run, but I did not run them quite as they wished in this particular. In quite a number of cases the Indians wished me to go down on the ranch quite a good deal further and take in more land than I surveyed; they showed me where they had worked the land, the ruins of houses, and so on, and claimed that
87 they had lived there and the land belonged to them; consequently, I should take it into the survey. Outside of the Indians' fenced fields, I think about two-thirds of the land I have included in the exterior boundaries are rough, mountainous, and brushy. In some places these rough, brushy lands extend clear to the cultivated fields. The balance, I would say, would be considered good farming land, if cleared of the brush. In making my survey of these exterior boundaries I discovered

evidences of use and cultivation of lands outside of the lands included within the fenced lines, such as remains of an irrigating ditch and the ruins of houses. In one place there are remains of two or three houses. These are even outside of the exterior boundaries as surveyed by me. The reason I did not take in all the lands the Indians wished me to was that if I had gone far enough to get in these isolated pieces they showed me that had once been cultivated I would have had to have included a good deal of land that they had never used, or that showed no evidences of having been cultivated, so I thought it best to leave out some that they claimed to have been cultivated than to include some that they did not claim to have been using. The lands which I have included in exterior boundaries of my survey are in a measure by themselves, as it includes a valley that is cut off by a low range of hills that runs between it and the other larger portion of the valley, except that the timbered ravine runs through it. With that exception, it is all cut off by a low range of hills. I am familiar with the ranch lines as patented, and two of the exterior boundary lines of these Indian lands, as I have surveyed them, follow the ranch line. The time I made this survey the Indians' stock was ranging all over the lands that I had surveyed for them. The stock
88 were all outside of the Indians' fences, because their fences had their crops inside. During that season of the year their crops were growing, and they were pasturing their stock outside of their fences and within the ranch lines. Some of the stock pasturing on the lands I surveyed for the Indians may not have belonged to them. I was not acquainted with the stock and I don't know who owned all of it. I did not know that some of it did not belong to the Indians; I didn't notice the brand upon it. I didn't know that there was any other stock there than the Indians' stock. I think there was much as one hundred head. There might have been more, as much as two hundred and fifty (250) head, and I not notice them. I wasn't looking especially at the stock, but just saw it as I was working there. A few days after I made the survey of the Indians' lands at the Agua Caliente I made a survey of the lands claimed by the Indians at Puerta de la Cruz, on the San José del Valle rancho, and I made a map of that survey. (Map shown witness, which he identifies as being the map referred to.) The map is a correct delineation of the lines as surveyed by me."

(The map referred to is offered in evidence by defendants, marked "Defendants' Exhibit F," the exterior boundaries of which map conforms to the description of the lands described second in defendants' answer as being claimed by José Meechac and others, containing some 266 43-100 acres. The property it described is located in the northern part of the rancho San José del Valle and contains thirteen separate small tracts, all adjoining each other, with the name of the Indian occupant written upon each. These are intended to represent the cultivated and fenced fields of the Indians. The remainder, being about three-fourths of the entire tract shown within the exterior boundaries of the tract, is not in cultivation. Such map and field notes are not inserted
89 here, as the above statement regarding same is ample for the purposes of appeal herein.)

Witness then proceeds:

"I obtained my information upon which this survey was based in the same way as I did at Agua Caliente. I had the Indians go around with

me and show me the lines of their lands. The Indians living at Puerta de la Cruz and I ran the lines approximately in accordance with their instructions. The interior lines marked upon the map—that is, the small lots—they represent the fields the Indians were actually cultivating at that time. I cannot give exactly the area included within these small tracts, nearer than from the scale of the map. I might vary from the actual area as much as one-tenth or one-twentieth. The actual area included in the exterior boundaries, however, is 266 43-100 acres. The lands within their fences they were using for corn and beans, a few melons, and some grain. In making my survey, I saw evidences of ancient occupancy in the way of the remains of buildings and fences, mortars in the rocks, which showed they had been worn a great many years, and an old burial ground, in which I could see the graves and crosses scattered around, as is their custom. The lands outside of the fences of the Indians that showed evidences of having been cultivated in the past had evidently been deserted and not cultivated for some years—six or eight years, I should say. It was not enclosed, and there was no other evidence of use except the remains of an old irrigating ditch across it, which had been abandoned."

All of this testimony of the witness Dorn was given subject to the same objections interposed by plaintiff, as already noted, and such objections were all sustained by the court at the time of deciding the case, and exception given to the defendants, which ruling defendants specify as error.

90 LEONARDO AULINGAWISH, recalled as a witness for defendants, and testified as follows:

"I know the Puerta de la Cruz Indian village on Warner's ranch; have known it as long as I remember. There were Indians living there when Juan Largo came to the ranch. I think they had been living there many years before. Then there were a good many living there; now there is but four or five. Old Valentine Meechac was living there then."

It was stipulated that Cecilio Chiporosa would, if called to the stand, testify to the same things as the witness Leonardo Aulingawish testified to.

VALENTINE MEECHAC, a witness on behalf of defendants, was sworn, and testified as follows:

"My name is Valentine Meechac. I live at Puerta Cruz; have been living there as long as I can remember. My mother and father told me I was born there. I remember the old San Luis Rey Mission, when the priests had charge of it. I was at the San Luis Rey Mission then; I was to work there for the priests. I remember when Juan Largo came to Warner's ranch, and when the American soldiers came through. I was living at the Puerta Cruz when Juan Largo came to the ranch. My family are all dead. I had three children, boys and girls, but they are all dead—grown boys and grown women. There was planting done by the Indians at Puerta Cruz when Warner came to the ranch. They planted corn, beans, watermelons, and muskmelons, and we had orchards there. The Indians have been living at Puerta Cruz ever since. I remem-

ber the priests from the mission coming over to Puerta Cruz to have religious services once. I think the village was under the priests' charge at San Luis Rey Mission. There were a good many more Indians at
91 Puerta Cruz when Juan Largo came to the ranch than now; they have been dying off and very few left. The Indians then farmed more land than they do now, and on the other side of the creek. Now there are not so many, and they farm right where the orchard is now. We used to farm the other side of the creek—all that piece there, and we got the ditches and everything to show yet. When Juan Largo came to the ranch, the Indians used to live on acorns and wild cherries and chia and rabbits, and one thing and another, besides what they raised. They got these things right around close to where they live now. I had been at San Luis Rey Mission before Juan Largo came, but had come back and was at home when Largo came. I left San Luis Rey when they quit the missions. That made me come home where my father and mother were. I was a grown man when the priests abandoned the missions. I didn't see Juan Largo's house burn, but I heard talking about it. The Indians didn't leave their lands that are not cultivated now. They all died out, and that is the way the land stays now. Couldn't tell how many years ago since they cultivated their lands outside of their orchards. The owners died out, and the ground stayed the way it is now. It must have been a long while ago, though I could not tell how many years. There are lots of apple trees and peach trees and pear trees in the orchard, and in the vineyard grape vines. The Indians are now cultivating the same lands that they cultivated when Juan Largo came to the ranch, and have been doing so ever since."

JOSE MEECHAC, one of the defendants, and a witness on behalf of defendants, was sworn and testified as follows:

"I live at Puerta de la Cruz; have been living there ever since I can remember; was born there. Besides me, my wife, Concenciona,
92 lives there, Valentine Meechac, José Maria Muta, Marcelino Quashish, José Antonio Soto, and the son of José Antonio; there are some others married off from the place, but they stay away from there now, and there is Josefa Quashish, Marcelino's wife. Marcelino Quashish was born there. I have always lived at Puerta Cruz. When I first remember, the Indians cultivated the lands right where they now live, and also on the other side of the creek. I showed Mr. Dorn, the surveyor, the lands the Indians used to cultivate when I was a boy; the Indians used the lands out to the lines I showed Mr. Dorn, and some of the lands went outside of the lines he surveyed; he left it out—some of the lands; they used to use that land for pasture, and used it to get wood on, and to get acorns on, and to get chollas on. When I was a boy the Indians used and cultivated all the lands inside of their present fences and some outside. There were a good many more Indians there then than now, but the Indians now are working the same places that their fathers and mothers used to work. There are five grown men and one young boy there now. I used to work the lands outside of our fences, now abandoned, until I was a grown young man; don't know how many years since they stopped working it. The Indians still use a good deal of the lands outside of their fences for pasture and to get

wood on it, and some acorns and one thing and another. Once Governor Downey's men corralled our horses when they got outside of our fences; the owners of the horses had to pay to get them out. The Indians at Puerta Cruz have about twenty or twenty-one horses, one cow and three goats; long ago they had a good many more horses. We now keep our horses inside of the fences—since last year; they used to go all around there loose; we don't let them run out now, because Governor Downey's men won't allow it.
93 When they used to pasture outside of the fences, they used to run loose right around the rancherias there—sometimes on the upper place—sometimes below."

Whereupon defendants rested.

Counsel for plaintiffs thereupon said:

"If the court should hold that the depositions referred to by counsel, to wit, those of Sexton, Foster, and Harazthy, are admissible in evidence, in whole or in part, plaintiffs will offer in evidence, from the same transcript, the deposition of José Castro, which deposition is in substance as follows:

"My name is José Castro; age forty-four years; reside at Monterey, California; am acquainted with the Rancho Agua Caliente, and Valle San José, in the county of San Diego, California, called Warner's ranch. It was granted to him in 1844 by Micheltoreno; in July, 1846, this ranch was occupied by the claimant, Warner, who lived upon it and cultivated it extensively, and had cattle and horses upon it."

Plaintiffs then offered in evidence the opinion of the board of land commissioners, rendered by Commissioner Felch, from the transcript of the record in the case of J. J. Warner vs. United States, already referred to, being case numbered 254 of the old district court of the southern district of California, which opinion is in the language following:

"J. J. Warner vs. The United States, for the place called Agua Caliente y Valle de San José, in San Diego County, containing six square leagues of land.

Two grants are presented and proved in this case; the first made by Governor Juan B. Alvarado to José Antonio Pico, on the 8th day of June, 1840; the other by Governor Manuel Micheltoreno, on the 28th day of November, 1844, to the present claimant. The land embraced in
94 the grant to Pico is designated by the name of Agua Caliente, and that described in the grant to Warner is called the Valle de San José. On comparing the description of the two parcels of land and maps which constitute portions of the two expedientes, it is manifest that the grant to Warner embraces the premises described in the previous grant to Pico. The place known by the name of Agua Caliente constitutes the northern portion of the valley known by the name of San José, while the grant to Warner describes the entire valley, and the witnesses testify that the rancho claimed by Warner is known by these names, but more frequently it has recently been called Warner's rancho. The testimony shows that Pico had set out some vines on the place before the grant was made to him, and that he built a house on the place after the grant, but in 1842 he left the place, probably on account of the danger from the Indians, and does not appear to have done anything more in connection with it.

The proof is scarcely sufficient to establish the performance of the conditions of the grant by him, while his absence from the place, and the want of any evidence of an attempt to return to it after 1842, indicates an abandonment of it. It was so treated by Warner in petitioning for a grant of the same in 1844, and by the governor in making the concession to him. If, however, there was any remaining interest in said Pico by virtue of the grant to him, the present claimant has succeeded to that interest by virtue of a conveyance made to him by said Pico on the thirteenth day of January, 1852. This conveyance is given in evidence.

I think, however, that the right of the present claimant must be determined entirely by the merits of the case based on Michelteroena's grant to him.

This grant was approved by the departmental assembly May 21, 1845.

95 The testimony of Andres Pico shows that Warner was living with his family on the place in the fall of 1844 and cultivating portions of the land.

His residence on the place appears to have been continued until 1851, when the Indians burnt his buildings and destroyed his stock. Since that time his occupation has been continued by his servants.

In the grant, the description of the land petitioned for is such as to embrace the entire valley called San José, as laid down on the map constituting a part of the expediente, giving well-defined land marks and boundaries, which the witnesses testify are well-known objects.

The valley is very irregular in shape and is surrounded by high hills.

Juridical measurement was required and the quantity of six square leagues was granted, but as the measurement was never obtained, it is important to determine whether the grantee is entitled to hold the entire premises described in the grant; using the scale given on the desino referred to in the grant, the quantity included in the premises can not exceed six square leagues of land.

The testimony of the witnesses who were interrogated on the subject estimate it variously; some more and some less than the quantity conceded. On an examination of the whole case, however, we are inclined to the opinion that the petitioner should have a conformation of the premises according to the description contained in the grant to him, and a decree will be entered accordingly.

Confirmed.

Filed in office Oct. 10, 1854.

GEO. FISHER, *Sec'y.*"

Plaintiffs next offered in evidence the decree of the board of land commissioners in the same case, which is in the language following:

J. J. Warner vs. *the United States. Decree.*

96 "In this case, on hearing the proofs and the allegations, it is adjudged by the commission that the claim of the land petitioned is valid, and it is therefore decreed that the same be confirmed.

The land of which confirmation is hereby made is situated in San Diego County and known by the name of the Valle de San José, and is described and bounded as follows, to wit: Bounded on the east with the

entrance from San Felipe and the mountain and the ravine (Cañada) of Ahuanga; on the north by the mountain, and on the south by the Conescel and the mountains; reference for more particular description to be had to the grant made to said Warner and the map thereon referred to, which are on file in this case; the lands hereby confirmed are intended to be confined to the valley and do not extend beyond the foot of the mountains referred to in the above description and containing six square leagues of land, a little more or less.

ALPHEUS FELCH,
R. AUG. THOMPSON,
S. B. FARWELL,
Commissioners.

Filed in office Oct. 10, 1854.

GEO. FISHER, *Sec'y.*"

Plaintiffs next offered in evidence the notice of appeal by the Attorney-General of the United States from such decree, which is as follows:

OFFICE OF THE ATTORNEY-GENERAL
OF THE UNITED STATES,
Washington, June 13th, 1855.

254. Valle de San José y Aguas Calientes. J. J. Warner, claimant. You will please take notice that in the above case, decided by the commissioners to ascertain and settle private land claims in the State of California in favor of the claimant, and a transcript of the proceedings in which was received in this office on the 9th day of April, 1855, the appeal in the district court of the United States for the south-
97 ern district of California will be prosecuted by the United States.

Very respectfully,

C. CUSHING, *Attorney-General.*

(Endorsed:) "Filed July 21st, 1855. C. E. Carr, clerk, by A. H. Clark, deputy."

Plaintiffs next offered in evidence the decree of the United States district court in the case of J. J. Warner vs. United States, appellant, confirming the action of the board of land commissioners, which is in the language following:

In the United States district court for the southern district of California

J. J. WARNER, APPELLEE,
ads.
THE UNITED STATES, APPELLANT. } Case No. 218, "San José del Valle."

This cause coming on to be heard on appeal from the final decision of the United States board of land commissioners to ascertain and settle the private land claims in the State of California, under an act of Congress approved March 3rd, 1851, on the transcript of the proceedings and decision of said board and of the papers and evidence upon which said decision was founded; and it appearing to the court that the said transcript and notice of appeal have been duly filed according to law, and counsel for the respective parties having been heard: It is ordered,

adjudged, and decreed that the said decision of said commissioners be affirmed, and it is further adjudged and decreed that the claim of the above-named appellee to the land, as described in the grant, is a good and valid claim, and it is ordered, adjudged, and decreed that the same be, and is hereby, confirmed.

The land of which confirmation is hereby made is situated in the county of San Diego and known as the "Valley of San José," and is described and bounded in the original grant and map to which it
98 refers, copies of which grant and map are on file with the papers in this case as follows, to wit: On the east by the entrance from the San Felipe and the mountains; on the west by the mountains and defile of Aguango; on the north by the mountains; the southern limits being the carrisal and mountains; to the extent of six square leagues, provided said quantity of six square leagues be contained within the boundaries; but if there be a less quantity than six square leagues, then the claim of appellee to such less quantity is hereby confirmed.

ISAAC S. K. OGIER,
U. S. District Judge.

(Endorsed:) "Filed Feb'y 13th, 1856. C. E. Carr, clerk. Recorded on page 198."

Plaintiff next offered in evidence the notice, signed by the Attorney-General of the United States, directed to the United States attorney for the southern district of California, notifying him that appeal from such decree would not be prosecuted. Such notice is as follows:

"CALIFORNIA LAND CLAIMS,
"ATTORNEY-GENERAL'S OFFICE,
"*29 September, 1856.*

"SIR: In the case of the claim of J. J. Warner, confirmed to the claimant by the commissioners, case No. two hundred and fifty-four (254), and also confirmed on appeal by the district court, appeal in the Supreme Court will not be prosecuted by the United States.

I am, respectfully, "C. CUSHING.

"PACIFICUS ORD, Esq.,
"*U. S. atty. for the southern dist. of Cal.*"

(Endorsed:) "Filed 24th February, 1857. C. Sims, clk., p. I. H. Coleman, dep."

Mr. WHITE. In so far as my offer comprises the proceedings before the board of land commissioners and the various steps taken
99 anterior to the issuance of the patent, it will depend whether the court sustains the objections heretofore made as to the admissibility of the testimony offered by the defendants as to whether I will press this evidence or not. If the court should hold that the patent itself is conclusive, this evidence would simply be immaterial; it would not do any harm to the case, but would simply encumber the record, and in that event I shall probably ask the court to withdraw it. But I am offering it now to meet the evidence offered.

Mr. WARD. Is this offered to be in in the event that the court rules

that the chain of title up to the final act of the Mexican Government is admissible?

Mr. WHITE. Yes, sir.

Mr. WARD. If the court rules that that evidence is admissible, then this evidence is offered?

Mr. WHITE. Yes, sir.

The plaintiffs then offered in evidence the judgment in the case in the superior court of San Diego County, California, numbered 595, and entitled Francisco Pico vs. J. J. Warner, J. G. Downey, and the Merchants' Exchange Bank of San Francisco, together with a notice of appeal to the Supreme Court in said case, and the appeal bond in said case, remittitur to this court in said case, filed in this court on August 4th, 1887, which case was numbered in the Supreme Court 11,961. The opinion of the Supreme Court in such case, being found on page 19, vol. 73 of the Cal. reports; such record is not inserted here, reference to the decision of the Supreme Court in the volume of California reports cited being deemed ample.

To the introduction of this evidence the defendants objected on the ground that it was incompetent, irrelevant, and immaterial in that the defendants in this action were in no way parties to that action, or
100 bound by that judgment, and the court had no jurisdiction over them, and upon the further ground that the plaintiffs claiming under the patent to Warner were estopped by its recitals that the rights of Warner are based upon the Pico grant as well as upon the Warner grant.

Counsel for plaintiffs stated that this evidence was offered only in the event that the court should hold that the expediente of the Pico grant was admissible. It should otherwise be withdrawn. This evidence being offered merely for the purpose of showing that the Pico grant was abandoned, and that no title passed to Warner thereunder, and that hence any limitation regarding Indian possession, contained in the Pico grant, would have no bearing on this case. The court having decided that the Pico expediente was inadmissible, this evidence was withdrawn.

C. W. GATES was then sworn as a witness on behalf of plaintiffs in rebuttal, and testified as follows:

"My name is C. W. Gates. I reside in Los Angeles; have lived there seven years. I am in the cattle business or stock business. I am familiar with the Warner ranch in this county; have known it since the spring of 1889. I have cattle there under contract with Governor Downey. Mr. Walter L. Vail and I are partners. I have had frequent occasions, since I have been on the ranch, to go near Puerta Cruz and Agua Caliente. My cattle have been pasturing upon that ranch. They have pastured right up to the Indians' fences at Puerta Cruz and the Agua Caliente, and on all sides of them, and a great many times when the fences have not been secure they have pastured inside. There have been no restrictions upon them at any time as to pasturing right up to the Indians' fences. The Indians have killed some of our cattle; they killed them to eat, but never attempted to drive them openly away. We have found the remains; once or
101 twice found Indians in the act of having them down. The instructions we had given to our men was to make the Indians keep their

stock inside of their enclosures, and this had been done in so far as we could get any men to attend to that. Of course it is a very hard thing with one hundred Indians in the neighborhood, by watching them all the time, to keep them away entirely; they will pasture them at night, will slide them out, and in the morning, as soon as daylight, they will bring them in. Whenever we would catch them, my instructions to the men was to corral them, but as long as they were in the enclosures not to molest them. There have been quite a number of Indians' stock taken up by our men, under our authority; I should say eight or ten different times at least. The Indians were notified after they were corralled, and they came and paid the damages and took the stock away. We charged one dollar a head. We have had both stock that belonged to the Indians at Puerta Cruz and Agua Caliente. One particular brand of horses that belonged to one of the Indians at Puerta Cruz—we have had them up twice, and since then the Indians have been pretty careful to keep them in the enclosures, as far as I know. I always pass the Puerta Cruz village on my way to the ranch. The Indians have extended their fences and taken in more land at both places since I have known the ranch. I never measured the amount. At Agua Caliente, I think it was the second year I came there, they built a new fence, the old fence being burned down, and I should judge they took in forty or fifty acres that first time. Then, I think two years ago, or two and a half years ago, they built another one, taking in, I should think, seventy-five or one hundred acres more, making in the neighborhood of one hundred and twenty-five to one hundred and fifty acres in all. At Puerta Cruz I judge they
102 have added, since we have been there, in the neighborhood of ten or twenty acres. At Puerta Cruz I judge there is fenced in altogether seventy-five or eighty acres—fifteen or twenty acres new, I should say. Governor Downey notified them not to extend their fences. I was with him on two or three occasions when they were building their fences, and the governor notified them in person. They stopped building it and closed it up. That was two years ago this summer. I don't know where the stock of the Agua Caliente Indians was captured by our men. All I know is the instructions were whenever they found them out of their enclosure to corral them, and they notified them they had done so, and the Indians got them and paid for them and took them back. I don't know where the boundaries of the land claimed by the Indians are. I instructed my men to corral any stock found outside of the enclosures of the Indians' fences, but do not know of my own knowledge that the stock corralled was obtained while within the exterior boundaries shown upon the map, as claimed by the Agua Caliente Indians, only I saw some of the Indians' hogs within those boundaries that I know the men corralled. In regard to the Puerta Cruz, I know that stock from there was corralled within their exterior boundaries, if those boundaries extended outside of the Indian fences at all. From the map shown me, I can testify that they had captured them outside of those enclosures, and within the lands the Indians claimed there at Puerta Cruz, and that the Indians have paid for such stock in order to get them back. I have seen the stock of the Indians—hogs and sheep and horses—running loose outside of the fences of the Agua Caliente village. We tried to corral them all when we got a chance. I am over to the Agua Caliente nearly every time I go to the

ranch, and until this summer I have averaged a trip there about
103 once a month—sometimes as often as two or three times a month.
Sometimes I am there for a month at a time; sometimes a week; sometimes only a couple of days. I generally try to get over to the Agua Caliente and get washed off—get a bath—and at other times I have gone to see if the stock were being troubled, and in riding to the ranch I ride around the hill outside of the ranch to see if everything is all right, and take that in with the other. When I have been to the Agua Caliente for baths, I have paid the Indians for them.

DANIEL CUNNINGHAM, a witness on behalf of plaintiffs, in rebuttal testified as follows:

"My name is Daniel Cunningham; I reside at Los Angeles; am acquainted with Governor Downey, one of the plaintiffs in this case; am working for him. I have known Warner's ranch since 1871. I have been there frequently every year as Governor Downey's foreman, looking after the ranch and stock. In 1871, '2, '3, and '4 he had sheep, horses, mules and cattle there. I have been at Agua Caliente and Puerta de la Cruz; I have been there generally twice and three times every month, as my business would lead me. Since I have been acquainted with the ranch, the Indians have taken in more or less lands every year. About three years ago, I judge, they took in, I should think, seventy-five or ninety acres at the Agua Caliente in a brush fence; I saw it done and forbid it. A small strip has been taken in at Puerta Cruz—might be perhaps twenty-five or thirty acres—that's guesswork. The Indians at both places have had some stock ever since I have known them. I know the men on the ranch have taken up the stock of the Indians—have corralled the stock of the Indians; about a year ago I helped corral the stock of the Puerta de la Cruz Indians. About last December we took
up some stock of the Agua Caliente Indians several times; we
104 notified them and they came and paid one dollar a head for them.
The stock of the ranch belonging to Governor Downey has run up on both sides all along the enclosures of the Indians, both at Puerta Cruz and Agua Calienta, wherever there might be feed for them, and the Indians have not interfered or prevented our pasturing in this land. It would be a matter of guesswork to say how much of the lands now enclosed at Puerta Cruz was taken in new two years ago—should judge about one-quarter of it."

(Both sides rested and case submitted on briefs to be filed.)

After the case was submitted the plaintiffs obtained leave of the court, against defendants' objection, to amend their complaint, and the same was thereafter amended, and it was stipulated that the answer of defendants on file to the original complaint, and appearing in the judgment roll in this case, be deemed their answer to the amended complaint so filed.

Upon the fifth day of November, 1895, the said case was transferred from department two, presided over by Judge George Puterbaugh, to department three of the said superior court of San Diego County, presided over by Judge W. L. Pierce, such transfer being made upon the court's own motion, on the ground that he felt disqualified, owing to having had some connection with the Warner ranch property.

That upon the twenty-ninth day of December, 1896, the said cause

was decided by the said court through W. L. Pierce, as the judge thereof, and the findings and judgment of said court entered in favor of plaintiffs, all of the objections interposed by plaintiffs to the evidence introduced by defendants having been sustained by said court, and the suf-
105 ficiency or effect of such evidence not being considered or regarded by the court, in rendering its decision.

That thereafter, to wit, on the eighth day of January, 1897, defendants filed in this court, and gave notice to the plaintiffs of their intention to move to set aside the said decision and for a new trial, a copy of which notice of intention to move for new trial, together with defendants' specifications of error, is in the language following:

In the superior court of the county of San Diego, State of California. J. Downey Harvey, administrator with the will annexed of the estate of John G. Downey, deceased (substituted for John G. Downey) et al., plaintiffs, vs. Alejandro Barker et al., defendants. No. 6919.

Notice of intention to move to set aside decision and for a new trial.

You will please take notice that the following named defendants herein, viz: Alejandro Barker, Baleriana Barker, Angela Barker, Vincente Sivimoat, Leon Moro Sivimoat, Canon Sivimoat, Cenciona Sivimoat, Salvador Nolasques, Adolfo Moro, Silvestra Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Solidad Chutnicat, Ceniona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chanate, Francisco Nauwila, Guadalupe Nauwila, Maria Ignacio Nauwila, José Blacktooth, Inez Blacktooth, Salvador Changalagash, Tomaso Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isadora Pena, José Maria Chavez, Pasqual Peloat, Francisca Peloat, José Juan Oulingawish, Cecilio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpio Rodrigez, Francisco Nawilot, Anastacia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Sllverio Nolasquez, José Antonia Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecilio Chiporosa,
106 Francisco Loss, José Cecilio, Salvador Gorra, Publicate Lograde, José Meechac, Concenciona Meechac, Valentine Meechac, José Maria Muta, José Antonio Soto, Marcelino Quashish, José Blacktooth, Rosaria Aulingawish, Ramona Sivimoat, Domingo Moro, Andrea Moro, Josefa Blacktooth, Harvacio Chutnicat, Josefa Quashish, and Juan Demati, intend to move this court in the above entitled action, that an order be made and entered therein that the decision of the court heretofore rendered, made, and entered therein, and that the judgment heretofore entered in said action upon said decision be vacated and set aside and that a new trial be granted on the following grounds, to wit:

First. Errors in law occurring at the trial and excepted to by the defendants;

Second. That the decision and judgment is against law;

Third. Insufficiency of evidence to justify the decision and verdict.

Said motion will be based upon the minutes of the court and the pleadings, papers filed, exhibits and evidence in said cause.

And defendants hereby specify the following errors in law, occurring upon the trial of said cause and excepted to by defendants, viz:

A. The court erred in excluding and not admitting in evidence the original expediente of the Warner grant, and also in excluding and not

admitting in evidence the original expediente of the Pico grant, being defendants' Exhibit A, and in excluding from evidence and not admitting the printed copies of such expedientes contained in the printed transcript on appeal in the case of Gage vs. Downey, in the supreme court of California, numbered in that court 14411, beginning at the top of page 67 of such printed transcript and continuing to the bottom of page 75 thereof.

107 See the objections to such evidence and the rulings thereon, page 4 and 5 of transcript.

B. The court erred in excluding and not admitting in evidence the petition of J. J. Warner, filed before the commissioners to settle private land claims in the State of California, being a certified copy, under the seal of the surveyor-general of the United States in and for the State of California, of such petition.

See objection and ruling thereon, page 6 of reporter's transcript.

C. The court erred in excluding and not admitting in evidence the depositions, respectively, of John Foster, M. M. Sexton, and Augustus Harazthy, offered by defendants from the transcript of proceedings in case numbered 254 in the United States district court for southern California, being part of the proceedings in confirmation of the title of plaintiff's predecessor in interest to the premises in controversy, such depositions being marked "Defendants' Exhibit C."

See objections thereto and ruling thereon, page 7 of reporter's transcript.

D. The court erred in excluding and not admitting in evidence the field notes of the final survey of the exterior boundaries of the rancho San José del Valle, confirmed by the United States to J. J. Warner, situated in the county of San Diego, State of California, surveyed by J. C. Hayes, deputy surveyor, July, 1859, being "Defendants' Exhibit D."

See objections thereto and ruling thereon, page 8, reporter's transcript.

E. The court erred in excluding and not admitting in evidence the testimony of Philip Crosthwaite, a witness on behalf of defendants, as to the occupancy by Indians of the lands of the Agua Caliente village, in the year 1850.

108 See objection and ruling thereon, page 10, reporter's transcript.

F. The court erred in sustaining similar objections to the similar testimony throughout the trial.

See reporter's transcript, page 11.

G. The court erred in excluding the evidence offered by defendants, being Mission or Pueblo Indians, and known and recognized as such under the laws of Spain, Mexico, and the United States.

H. The court erred in excluding and not admitting in evidence the testimony offered by defendants going to show that these defendants and their ancestors were in the actual, peaceable, open, notorious, exclusive, and adverse occupancy and use of the premises claimed by them in their answer in this action at the time of the acquisition from the Mexican Government by the United States of the territory embraced in the State of California, and for more than thirty years prior thereto, and especially at the time of the inception of plaintiff's rights under the grant from the Mexican Government upon which the patent under which plaintiff's claim is based, and defendants particularly specify the following instances

of the court's ruling in this effect, viz: The court erred in sustaining plaintiff's objections to and excluding and ruling out the testimony of the following witnesses on behalf of defendants, all tending to show the fact, character, and extent of the use, occupancy, and possession by defendants and their ancestors of the premises in controversy from the time prior to the inception of plaintiff's title from the Mexican Government to the premises in controversy, viz, the evidence of Joseph Swycaffer, pages 13 to 23 of reporter's transcript; testimony of Adolfo Moro, pages 23 to 28, reporter's transcript; the testimony of Machola Moro, pages 28 to 37 of reporter's transcript; the testimony of Leonardo
109 Aulingawish, pages 38 to 45, reporter's transcript; the testimony of Francisco Pico, pages 45 to 48 of reporter's transcript; the testimony of Cecilio Chiporosa, pages 48 to 53 of reporter's transcript; the testimony of Salvador Changalagash, pages 53 to 54, reporter's transcript; the testimony of Marselina Sivimoat (Blacktooth), pages 56 to 59, reporter's transcript; the testimony of Anastacia Nawilot, pages 59 to 61, reporter's transcript; the testimony of Alejandro Barker, pages 62 to 75, reporter's transcript, and the testimony of E. L. Dorn, pages 75 to 95, reporter's transcript.

The court, at the time of the evidence of all of the foregoing-named witnesses on behalf of defendants was offered, reserved its ruling upon the objections made by plaintiff to the admissibility of such testimony, and no specific ruling upon any of such objections has been entered upon the transcript of reporter's notes, but the ruling made by the court upon page 11 of the reporter's transcript was intended, we are informed, to apply to and cover all objections interposed to the admissibility of the testimony of each of such witness in so far as such testimony was in any way directed towards varying, modifying, limiting, or defeating plaintiff's title acquired under the patent from the United States introduced in evidence by plaintiff, the holding of the court being that none of such evidence offered by defendants was admissible to in any way affect or qualify the title vested in plaintiff's predecessor in interest by virtue of such patent, and defendants specify each and all of such rulings as being error.

I. The court erred in excluding and not admitting in evidence defendants' Exhibit G, being the depositions taken upon this trial of the witnesses for defendants, José Maria Avilla, Ygnacio Francisco de la Cruz Garcia, Pio Pico, and J. J. Warner, in so far as the testimony of
110 said witnesses was directed to the character, extent, or duration of use or occupancy of the premises in controversy by defendants or their ancestors, and in so far as the same tended to establish the character of the defendants as Mission or Pueblo Indians. No note, marginal or otherwise, is made upon such depositions to show what particular objections were or what objections were not overruled, but we are informed that the ruling of the court contained upon page 11 of the transcript of reporter's notes was intended to apply to and does apply to all such objections as to the admissibility of such testimony.

J. The court erred in sustaining the objection of the plaintiff to the testimony of Tomasa Nawilot, Sinon Sivimoat, Francisco Nawilot, José Blacktooth, Ysabel Aulingawish, Maria Ygnacia Nuawila, Solidad Chutnicat, Manuelle Sivimoat, all old Indians, defendants in this case, whom

it was stipulated should be considered as having testified on behalf of the defendants at the Agua Caliente village, Warner's ranch; that they have lived there all their lives; that they were nearly grown when Colonel J. J. Warner came on the ranch; that they remember when the American soldiers came through the ranch; that there were as many or more Indians living at Agua Caliente village when they were children than there are now; that they have never been disturbed in their possession of the Agua Caliente; that the cultivation in early times, when Warner came on the ranch and before, by the Indians was less than now; that the present cultivated fields include the old planting grounds except in one or two places; that when Warner came on the ranch and before, the Indians lived mostly on wild-grass seeds, chilla and other seeds, and acorns, wild cherries, tunas, mescal roots, rabbits, squirrels, and rats; that the Indians have always used the water of the hot springs
111 for irrigating, bathing, washing, and for soaking acorns and other seeds to take the bitter taste out of them.

This stipulation was made subject to plaintiff's objections as already reserved, that such testimony was incompetent, irrelevant, and immaterial for any purpose, and could not be permitted to vary, limit, contradict, or in any way defeat plaintiff's title based upon United States patent.

No ruling appears in the record, but we understand that such objection was sustained by virtue of the ruling of the court contained on page 11 of the reporter's transcript, reading, "All similar objections sustained and exceptions taken. W. L. Pierce, judge," being the ruling already referred to, to which ruling we especially except.

K. The court erred in sustaining plaintiff's objections to and ruling out all testimony of the various witnesses of defendants tending to show the pedigree of the defendants and to show that they and their ancestors were Mission or Pueblo Indians.

L. The court erred in sustaining the objections of plaintiff to the testimony of witness Dorn, a witness on behalf of defendants, introduced to show the boundaries of defendants' fields and their possession and occupancy, such objection being the general objection interposed by plaintiff on page 11, reporter's transcript, as to all evidence based upon use or occupancy by the defendants as a foundation of their title. No specific objection is interposed in the record to any specific part of the testimony of said Dorn, but we understand that the whole thereof was excluded under the ruling of the court, upon the general objection interposed by plaintiff on page 11 of reporter's transcript, and we specify such ruling as error, in so far as it applies to any of the testimony of said Dorn.
112 M. The court erred in permitting all of the cross-examination of defendants' witnesses to be withdrawn, such ruling being made upon page 12, reporter's transcript, as directed in the cross-examination of Philip Crosthwaite, and we understand that the same ruling applies to all of the cross-examination of defendants' other witnesses, it having been stated by counsel for plaintiff, at the time of making such cross-examination, that if his objection to the testimony in chief was sustained, then the cross-examination would be withdrawn. We specify the order of the court permitting the withdrawal of the cross-examination of each of the defendants' witnesses as error.

N. The court erred in not sustaining, but in overruling defendants'

objection to the admission in evidence of the judgment in the case numbered 595, Francisco Pico *vs.* J. G. Downey and Merchants' Exchange Bank of San Francisco, together with notice of appeal to the Supreme Court and appeal bond in said case and the remittitur from the Supreme Court of this case filed in this court on August 4th, 1887, which case was numbered in the Supreme Court, 11,961, the report of such decision being in 73 California, page 17.

See defendants' objections thereto, pages 109, 110 of reporter's transcript.

O. The court erred in permitting plaintiff to file amended complaint on the 4th of May, 1894, long after trial of this case had been closed and the same had been submitted to the court.

Plaintiff then and there objected to the filing of such amended complaint so far as paragraph 5 thereof was concerned, which paragraph set forth the derivation of plaintiff's title; such objection was made on the ground that the proposed amendment was made after trial and on the ground that the facts therein set forth were known to the plaintiff
113 at the time of the filing of the original complaint, and on the ground that matter therein contained was immaterial and unnecessary; and the court's ruling in permitting such amendment, the defendants specify as error.

Defendants specify the following respects in which the evidence is insufficient to justify the decision and judgment of the court, viz:

1st. The evidence is insufficient to justify Finding I of the court, "That all of said defendants last above named are Indians and half-breed Indians," in this, that after ruling out and excluding all of the evidence excluded by the court, as hereinabove stated, there was no evidence of any character to show as to whether or not the defendants or any of them were Indians or half-breed Indians.

2d. There is not sufficient evidence to support or justify the Finding II of the court that the plaintiffs are the owners in fee simple of the lands described in said Finding II or any part thereof, except by wrongfully and unlawfully excluding all of defendants' evidence, which was wrongfully and unlawfully excluded by the court, as hereinabove stated.

That defendants specify this finding as being not sustained by the evidence, for the reason that had the evidence introduced by the defendants, and wrongfully excluded, been admitted, the same would have established the fact that plaintiffs were not the owners in fee simple of the property described in paragraph 2 of said findings, but would have established the fact that plaintiff's ownership was subject and subordinate to the continued right of use, occupancy, and possession by defendants of the premises claimed in defendants' answer.

Therefore defendants state that Finding II of the court is not sustained by the evidence, but is contrary to the evidence.

114 3d. Defendants state that there is not sufficient or any evidence to justify that portion of Finding III of the court "that the claims of the defendants and each of them are without right, title, or interest whatever in or to said lands or premises, or any part thereof," in this, that had the evidence offered and introduced on behalf of defendants not been rejected and excluded the same would have shown beyond question that the defendants and each of them are entitled to the continued use,

occupancy, and possession of the premises claimed by them in their answer.

4th. There is not sufficient evidence to sustain or justify that portion of Finding IV of the court which holds that plaintiffs have ownership in fee simple of the lands and premises described in the complaint, in that had the evidence offered and introduced by defendants not been wrongfully excluded by the court, the same would have shown that plaintiffs' title to said premises was subject and subordinate to the continued right to use, occupancy, and possession thereof by the defendants, as in their answer alleged; and for the same reason defendants allege that that portion of Finding VI of the court holding "that said John G. Downey in his lifetime and at the time of his death and the Merchants' Exchange Bank of San Francisco were the owners in fee simple of all of the lands in the complaint described," is not sustained or justified by the evidence.

5th. Finding VII of the court, holding that these defendants are not, and that none of them are, and that their ancestors were not, nor were any of them, at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the State of California, and for more than thirty years prior thereto, or at all, recognized as Mission or Pueblo Indians by the laws of Spain, Mexico, and
115 the United States, and were not in the adverse possession, occupancy, or use of the lands described in said finding VII, is not, and no part thereof is sustained by the evidence, in this: that had the evidence offered by defendants and erroneously excluded by the court, as hereinbefore set forth in the specification of error committed by the court, been admitted, as it should have been, the same taken together would prove and establish the fact that the said defendants are now, and that they and their ancestors were, at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the State of California, and for more than thirty years prior thereto were, and were recognized as Mission or Pueblo Indians by the laws of Spain, Mexico, and the United States, and were, during all of such period, in the adverse possession, occupancy, and use of the premises claimed by them in their answer herein; and that portion of such finding holding that the defendants have never been in the adverse possession, occupancy, or use of any of the lands claimed by them, and have never acquired and did not hold or have any interest or title in said lands, or any part thereof, and that they are not, nor is either of them, in equity or otherwise, the owner or owners of or entitled to the possession, occupancy, or use of the said lands or any of them; but that plaintiffs are entitled to the immediate possession of all said lands, is not nor is any part thereof sustained or justified by the evidence herein, in that had all the evidence offered and introduced by defendants, which was rejected and excluded by the court, as stated in defendants' specifications of error already hereinabove set forth, been admitted, as the same should have been, it would have established the fact that defendants and their ancestors have, for a period beginning as much as thirty years prior to the acquisition of California by the United States
116 from the Mexican Government and continuing to date, been in the adverse possession, occupancy, and use of the lands by them claimed in their answer, and have acquired the right to continue the use, occu-

pancy, and possession of said lands, and every part thereof, and are in equity the owners of and entitled to such right of possession, occupancy, and use of said lands, and that plaintiffs are not entitled to the possession of the same, or any part thereof.

6th. There is not sufficient or any evidence to justify finding VIII of the court that the grant by the Mexican Government to the predecessors of plaintiffs of the lands in the complaint described was not made subject to or in subordination to the rights of the defendants, their ancestors, or predecessors, or any of them, in this: that had all of the evidence offered and introduced by defendants, which was wrongfully and unlawfully rejected by the court, as hereinabove alleged in defendants' specifications of error, been admitted, the same would have shown and demonstrated that all rights of the plaintiffs to the ownership of the property in controversy was subject and subordinate to the rights of the defendants, their ancestors, and predecessors, to the continued use, occupancy, and possession of the premises in controversy.

7th. That findings IX and X of the court are not sustained by, but are contrary to the evidence herein, in the same particulars alleged, and for the same reasons given as to findings VII and VIII.

8th. That findings XI and XII are not sustained by, but are contrary to the evidence in the same particulars, and for the same reasons given as to the findings VII and VIII.

9th. That no portion of finding XVI is sustained by the evidence, in this: that if all the evidence offered and introduced by defendant, which was admissible, had been admitted, and not excluded
117 and rejected by the court, as alleged hereinabove in the specifications of error committed by the court, such evidence would have established and proven that the defendants and their ancestors, at the time of the acquisition by the United States from Mexico of the territory embraced in the State of California, and for thirty years prior thereto, were Mission or Pueblo Indians, and that they occupied and held possession of the lands claimed by defendants in their answer herein, under and by virtue of the laws and regulations of the Government of Mexico, and under a claim of rights so to do, and that they were entitled by said laws and regulations so to use and occupy said lands against all and any parties whatsoever, and that such rights so to use, occupy, and possess said lands by defendants in their answer was established and guaranteed by the laws and regulations of the Mexican Government, at the time of the grant by the Mexican Government to the plaintiffs' predecessors in interest of the lands in controversy, and at the time of the transfer of the sovereignity from the Mexican Government to the United States, and that the United States did, by the treaty of Guadaloupe Hidalgo, and by the general law of nations, recognize and stipulate to protect such right and title of defendants and their ancestors to such use, occupancy, and possession of said lands; and such evidence, had the same been admitted by the court, as it should have been, would have proven and established the fact that the lands claimed by defendants, as described in their answer, were not subject, under the laws of Mexico, to private grant by the Mexican Government, and that the grant or purported grant, upon which plaintiffs' title rests, was subject and subordinate to the continued rights of defend-

ants and their ancestors to the continued use, occupancy, and pos-
118 session of the said premises, and would have further established the fact that the issuing of the patent by the United States Government, under which plaintiffs' claim and the confirmation of the grant, upon which said patent is based, was not intended to convey the lands and premises therein described absolutely without regard to the rights or claims of any of the said defendants, and without being subject or subordinate to any rights or claims of said defendants, but the said patent was issued, and the said grant confirmed, subject and subordinate to the rights and claims of these defendants and their ancestors to remain in the undisturbed use, occupancy, and possession of the said premises, and that the patent, in so far as the same failed to recognize upon its face such right of use, occupancy, and possession, was a cloud upon the title of the said defendants.

The defendants allege that owing to the errors of the court, as hereinabove specifically pointed out, in the rejection and exclusion of defendants' evidence, and owing to the findings of the court, as above specified, being unsupported by the evidence introduced by defendants, which should have been admitted, the decision and judgment of said court is against law.

Wherefore defendants ask that an order be made and entered by the court that the decision by the court heretofore rendered, made and entered herein, and the judgment heretofore entered in this action upon such decision, be vacated and set aside, and that a new trial be granted upon the grounds hereinabove alleged.

Dated this 8th day of January, 1897.

SHIRLEY C. WARD and
FRANK D. LEWIS,
Attorneys for Defendants.

119 *To the plaintiffs herein and their attorneys, Messrs. White & Monroe:*

That said motion for new trial came on for hearing before the court upon the ninth day of February, 1897, and said motion was fully argued, and submitted to the court, the same being heard by Judge E. S. Torrence, as Judge Pierce, who decided the cause, had retired from office, his said term of office having expired, and he was no longer judge of said court.

That upon the presentation and argument of said motion, it was assumed by counsel that all of the objections interposed by plaintiffs to the evidence offered by defendants had been sustained, and all of such evidence held by the court to be immaterial, and that the only question to be passed upon by the court upon such motion for a new trial was as to whether or not the evidence so offered by defendants was material or admissible, to in any way affect, vary, or control the rights of the plaintiffs under the patent from the United States to J. J. Warner, and only such question was presented in the argument of such motion, and the sufficiency of such evidence as was offered by defendants and excluded by the court to establish the position of defendants, as set up in defendants' answer, was in no way controverted upon such argument, and in passing upon such motion the court considered only the question of law as to

whether defendants' evidence was material and relevant, and its sufficiency was in no way considered or gone into.

That upon the twenty-fourth day of April, 1897, the said motion of defendants for new trial of said cause was denied by the court, and a minute entry of such order denying such motion duly entered, and defendants present the foregoing as a correct statement on appeal in said cause.

SHIRLEY C. WARD and
FRANK D. LEWIS,
Attorneys for Defendants.

120 The foregoing statement on appeal proposed and presented within the time stipulated by the parties, the same is correct, and it is agreed the same may be settled by the court as above engrossed.

Dated Oct. 25th, 1897.

SHIRLEY C. WARD &
FRANK D. LEWIS,
Attys. for Defdts.

WHITE & MONROE,
Attys. for Plffs.

This statement settled this 28th day of Oct., 1897.

E. S. TORRENCE, *Judge.*

[Title of cause.]

Copy from clerk's minute book, Saturday, April 24th, 1897.

On this day defendants' motion for a new trial of this cause, heretofore submitted, is by the court denied.

[Title of court and cause.]

Notice of appeal.

You will please take notice that the defendants in the above-entitled action hereby appeal to the supreme court of the State of California, from the judgment in the above-entitled cause, entered upon the 29th day of December, 1896, in favor of plaintiff and against the defendants in said action, and from the whole thereof, and also from the order of the superior court of San Diego County, denying defendants' motion for a new trial of the said cause, made and entered in the minutes of the said court on the 24th day of April, 1897, and from the whole thereof.

Dated this 22nd day of June, 1897.

Yours, etc.,

SHIRLEY C. WARD and
FRANK D. LEWIS,
Attys. for Defendants.

121 To the clerk of the said superior court and to Messrs. White & Monroe, attorneys for plaintiff.

(Endorsed:) Service of within accepted this 22nd day of June, 1897. White & Monroe, attys. for plff. Filed June 23rd, 1897. Will H. Holcomb, clerk.

Stipulation as to correctness of transcript.

It is hereby stipulated that the foregoing transcript on appeal contains a correct copy of the judgment roll, the statement on appeal, the minute entry of order denying defendants' motion for new trial, and the notice of appeal filed in said cause No. 8324 in the superior court of San Diego County, California. And it is further stipulated that a good and sufficient undertaking on appeal was duly filed in said cause within the time prescribed by law.

MONROE AND WHITE,
Attorneys for Plff.

SHIRLEY C. WARD and
FRANK D. LEWIS,
Attys. for Defts.

122, 123 (Indorsed:) Received copy of within for the judge who tried the case, this day of November, 1897. Will H. Holcomb, clerk. By deputy. Service accepted by copy this 27th day of November, 1897. White & Monroe.

124 Filed October 4, 1899. In bank.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE ESTATE of John G. Downey, deceased (substituted for John G. Downey), and the Merchants' Exchange Bank of San Francisco (a corporation), plaintiffs and respondents,
vs.
ALLEJANDRO BARKER ET AL., DEFENDANTS AND appellants.
} L. A. No. 490.

Plaintiffs claim title to the property in controversy through a patent of the United States issued to J. J. Warner January 16, 1880, pursuant to the provisions of the act of Congress of March 3, 1851, entitled, "An act to ascertain and settle the private land claims in the State of California." Defendants claim a possessory right as Mission or Pueblo Indians, and by their answers form three groups, describing severally the tracts of land alleged to be occupied by them, the first consisting of nineteen hundred and seven acres; the second, two hundred and sixty-six and forty-three one-hundredths; and the third, one hundred and twenty acres. They base their right of possession to such tracts of land upon the claim that their ancestors were Mission Indians, and that they have been in continuous occupancy, use, and possession of said premises from time immemorial, and were in such possession at the time the rights of the plaintiffs' grantor accrued under the Mexican Government. At the trial the plaintiffs introduced in evidence the United States patent to Warner, and it was thereupon stipulated that the lands described in said patent included the premises in controversy, and that plaintiffs had succeeded to all the rights of the patentee, and had paid all taxes levied or assessed upon said premises since the patent issued. Thereupon in support of the claim on behalf of the defendants there was offered in evidence the expediente of two grants of the Mexican Government, the first being made June 8, 1840, to Jose Antonio Pico by Juan B. Alvarado, governor of California, and the second made November 28, 1844,

to Juan Jose Warner by Manuel Micheltorena, governor-general of California. The grant to Pico was of the "land known by the name of 'Agua Caliente,' bounded by the ranch of 'San Jose Valle' * * * subjecting himself to pay for the place of worship and other improvements that be there belonging to the San Luis Rey Mission, and not molest (prejudicor) the Indians that thereon may be established, and with the approbation of the most excellent assembly of the department, and the conditions following:

"First. He is allowed to fence it in, without interfering with the roads, crossroads, and other usages (servidumbres); he will possess it fully and exclusively, turning it to agricultural or any other use he may see fit; but within a year he shall construct a house thereon and live in it.

"Second. When the property shall have been confirmed to him, he shall petition the respective judge to give him possession thereof by virtue of this order, and shall mark out the boundaries on whose limits he shall fix the landmarks, some fruit and wild trees that may be of some utility.

"Third. The land of which donation is hereby made is of the extent mentioned in the plan which goes with the 'expedient's.' The judge who should give possession thereof shall have it surveyed according to law, leaving the residue that may result to the nation for their purposes.

"Fourth. If he should fail to comply with these conditions he shall forfeit his title to the land, and it will be denounced by another."

Accompanying the grant to Warner of 1844, offered on behalf of the defendants, are the following papers:

The petition of Warner for the place known by the name as "Valle San Jose," which he alleges is vacant and situated east of the pueblo of San Diego, distant about twenty leagues, and surrounded by mountains.

"To the most R. P. VINCENT OLIVAS:

"With the object of soliciting in property the place known by the name 'Valle de San Jose' (formerly occupied by the mission under your charge), I beg of you to be so kind as to inform me if, at the present day, the mission of San Diego does occupy the said land, and if not, how long since it has been abandoned.

JUAN J. WARNER."

"The 'Valley of San Jose' can be granted to the party who petitions for it, inasmuch as the mission of San Diego, to whom it belonged, has no means sufficient to cultivate and occupy it, and it is not so necessary for the mission.

"FR. VINCENT P. OLIVAS.

"Mission of San Diego, August 5, 1844."

"OFFICE OF THE FIRST JUSTICE OF THE PEACE, SAN DIEGO.

"In view of the petition which the party interested remits to this office, I beg to state that the said 'Valle San Jose' is, and has for the past two years, been vacant and abandoned, without any goods nor cultivation on the part of San Diego; but said place belongs at the present time to the said mission, and at petitioner's request I sign this, in San Diego.

"JUAN MA MARRON.

"August 6, 1844."

The secretary forwarded the papers to the governor as follows:

"GOVERNOR: The land which is petitioned for, it seems that there is no objection to its being granted according to the information which I enclose from the Rev. P. F. Vincent Olivas, and from the judge of San Diego, Juan Marron. The petitioner is a naturalized citizen and is a person of good qualities, so that if your excellency does not dispose otherwise, you can accede to his petition.

"MANUEL JIMENO.

"Monterey, September 2, 1844."

(Same date.)

"Extend to him the title, and I order that he be obliged to procure the plan thereof within four months from this date; and should he fail to comply with such obligation within said term this title will be null and of no value.

"So it ordered and decreed.

"MICHELTORENA."

The deseno, or sketch, accompanying the petition describing the property includes the entire San Jose valley. The grant of Governor Micheltorena recites that, whereas one Jose Warner had petitioned for the land known by the name of "Valley de San Jose," giving the boundaries thereof, and "having previously complied with the notices and investigations on such matters as prescribed by the laws and regulations, exercising the powers conferred on me, in the name of the Mexican nation, I have resolved to grant him the said land, declaring it by these presents his property, subject to the approbation of the most excellent assembly of the department, and to the conditions following, to wit:"

The conditions are similar to those contained in the grant to Pico, with the exception that it omits entirely the clause "not to molest (prejudicor) the Indians that thereon may be established."

Thereupon Warner addressed the governor, stating that he would proceed under the grant, and subsequently commissioners were appointed to make an examination and report. In their report they say: "And it appearing from the said examination that the said concession in favor of Juan J. Warner was made in perfect conformity with what the laws prescribe in this particular * * * the concession is hereby approved in favor of Juan J. Warner of the place named 'Valle de San Jose,' adjudicated in property by the government of this department." This report was subsequently approved by the departmental assembly.

There was also offered on behalf of the defendants the petition of Warner to the land commission, under the act of Congress asking confirmation of his title to the lands in controversy which, it is claimed, was based on the two grants referred to. But Warner in the petition says that he claims by virtue of grants from the Mexican nation a tract of land in the county of San Diego known as the "Valle de San Jose and Agua Caliente;" that so much as is known by the name of Agua Caliente was granted in 1840 to Jose Antonio Pico; that the same had become vested in the petitioner; that the remainder of the tract was subsequently granted to the petitioner in 1844 by Micheltorena; "that said second-named grant was approved and confirmed to the claimant by

an act of the departmental assembly of California, passed on the 17th day of June, 1845. The claimant has no knowledge whether such first-named grant has or has not been so confirmed." By the decree of confirmation recited in the patent it is adjudged that "the land described in the grant" is a good and valid claim, and that said land is "known as the 'Valley of San Jose,' and is bounded and described in the original grant and map to which it refers, copies of which grant and map are on file with the papers in this case, as follows, to wit: On the east by the entrance from San Felipe and the mountains; on the west by the mountains and defile of Aguando; on the north by the mountains, the southern limits being the canisal and the mountains to the extent of 6 square leagues, provided said quantity of 6 square leagues be contained within the boundaries." The patent contained the usual recitals that the said decree had become final, and a survey of the premises thereafter made and approved, and closing with the usual granting clause.

There were offered also on behalf of the defendants certain depositions and oral testimony to the effect that the defendants and their ancestors were Mission Indians, and they had formerly been under the charge of the San Luis Rey Mission, and had been in the exclusive use, occupancy, and possession of the premises in controversy continuously since a time prior to the inception of the plaintiffs' title from Mexico, and had always claimed and exercised the right to so use said property.

To these several offers made on behalf of the defendants, plaintiffs interposed objections on the ground that the evidence offered was incompetent, irrelevant, and immaterial, and that the patent was conclusive as to the title of the patentee. The court reserved its ruling upon such objections, and thereafter sustained the objections and excluded the testimony, to which ruling the defendants excepted. Judgment went for the plaintiffs, and the defendants subsequently moved for a new trial, which motion was denied. The appeal is from the judgment and from the order denying a new trial.

The position of counsel on behalf of the appellants may be summarized as follows:

1. That the patent under which plaintiffs claim specified that it "shall not affect the interest of third persons," and it is claimed defendants are third persons, and are not thereby concluded.

125 2. That the object of the act of Congress of March 3, 1851, was accomplished by presenting, confirming, and patenting Warner's claim to the land in question so as to relieve these defendants of the necessity of presenting their claim to the board of land commissioners.

3. That the decision of the board of land commissioners was not conclusive except against the claimant and the United States Government and parties claiming under the United States Government by title subsequent; as it was not the province of such tribunals to pass upon conflicting titles as between individuals; that they were left just as they existed at the time of the change of sovereignty.

4. That under the Mexican law Warner held the legal title subject to the easement of the Indians' possessory rights, and that the confirmation of the legal title and issuance of the patent in no way changed the character of such title, nor freed it from the easement in favor of the defendants.

5. That in order to constitute one a "third person" under the act of March 3, 1851, it is not essential that he should deraign his title through the same specific grant as the party whose title was presented and confirmed; that it is only essential that the party claiming to be a "third person" should have a superior and anterior title to that confirmed; and the fact that his claim is hostile to the claim confirmed does not preclude the existence of a trust in his favor created by operation of law.

6. That it was not required that the title of the Indians should rest upon a specific grant, but their rights were protected by the general law of the land.

7. That the United States assumed both by its treaty and the law of nations to protect and preserve all existing private property rights within the ceded territory, which it is claimed includes the rights of these defendants.

To sustain such claims the appellants rely upon Byrne vs. Alas, 74 Cal., 628. It was stipulated in that case that the defendants were Mission or Pueblo Indians; that their ancestors and predecessors had been in the continuous, open and notorious, peaceable, and exclusive possession, occupancy, and use of the premises in controversy, claiming adversely to all the world, ever since and for a long time prior to the establishment of the Mexican Republic; and that their claim had not been presented for confirmation under the act of 1851; and that the premises were included within the exterior boundaries of the Mexican grant of the San Jacinto Rancho, and patented to Estidillo, from whom plaintiff derives title; and it was expressly provided in that grant that "he [Estidillo] shall in no way disturb or molest the Indians who are established or living thereon at the present time."

In the opinion of the court in that case it is said: "The patentee and his grantee under the law and the terms of the grant took the fee, subject at least to the right of occupancy by the Indians; and those rights are still preserved unless the Indians forfeited them by failure to present their claims to the board of land commissioners appointed by the act of March 3, 1851." After reviewing the history of the Indians under the Spanish and Mexican Governments, and their treatment by such Governments, particularly mission or pueblo Indians, the opinion proceeds: "It becomes necessary to inquire to what extent, if at all, the confirmation of the Estidillo grant and the United States patent affected the claim of these defendants. The fifteenth section of the act of March 3, 1851, provides that the decree or any patent issued under the act shall be conclusive between the United States and claimants only, and shall not affect the interests of third persons. Under this clause the rights of the Indians were preserved without presenting their claims. * * * The patent, therefore, passed the legal title to the patentee burdened with whatever equities existed at the time of the cession of California in favor of third persons. Under the treaty the Government of the United States stood in the place of the Mexican Government. Its patent confirmed the grant, proclaimed it to be good, neither added to nor detracted from it in any way. It left the title of Estidillo just as it was at the time of the treaty, so far as the Indians were concerned, and it remained thereafter as to them just as it would have remained if the treaty had not been made. If the Indians were

entitled to possession before the date of the patent they were entitled to it afterwards, so long as any of the community remained in actual possession. So far as we have been able to learn, nothing remained for them to do under the laws of Spain or Mexico to complete their rights of possession. Neither was there any act or writing required on the part of the Government. Their right was, therefore, complete." Referring to section 16 of the act of March 3, 1851, which reads "that it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians and those who are engaged in agriculture or labor of any kind, also those which are occupied and cultivated by pueblo or rancheros Indians," the court adds: "This language indicates that Congress did not intend that the rights of the Indians should be cut off by a failure on their part to present their claims, but that it should be the duty of the commissioners to ascertain and report the tenure by which they held their lands."

The case under consideration, it will be seen, differs materially from that of Byrne vs. Alas. Here it is shown that by the investigation of the Mexican officials and their reports, together with the grant to Warner, the land, some portions of which had formerly been occupied, was vacant and unoccupied at the date of the grant, and in the grant the clause in reference to the rights of the Indians is omitted entirely. At the time of the Pico grant, four years before, there may have been some mission or pueblo Indians at the Agua Caliente, covered by that grant. The later grant, as already stated, embraced the whole valley; and this was the grant which was confirmed and patented, as clearly appears from the papers offered in evidence on the part of the defendants. This is also shown by the case of Pico vs. Warner, 78 Cal., 17. In the opinion in that case it is said: "The findings are in substance as follows: On the 8th day of June, 1840, the governor of California granted to José Antonio Pico a tract of land known as the Agua Caliente, to the extent of four square leagues, the same being a part of the Valle de San José, which contains about ten square leagues, and is now situated in San Diego County. On the 28th day of November, 1844, the governor of California granted to the defendant J. J. Warner the tract of land known as the Valle de San José to the extent of six square leagues." The court further says that the Pico grant was rejected and the Warner grant confirmed, and add: "In pursuance of the comfirmation of the Warner grant the United States, on the 20th day of February, 1880, issued to Warner its patent for the premises described in the complaint, including the Agua Caliente tract and other lands not embraced in the Pico grant."

It is useless for counsel on behalf of appellants to contend that the Warner grant is the same as the Pico grant in reference to the rights of the Indians. Not to interfere with roads and other usages (servidumbres), under the circumstances, can not be tortured into the equivalent of a reservation in the grant to "not molest (prejudicor) the Indians that thereon may be established."

The grant to Warner neither reserved nor preserved any possessory or other right or supposed right in the Indians; and the reason of the difference between the two grants in this regard is obvious. The record shows that before the Warner grant was issued an investigation was had

by the proper Mexican officers, who reported "that the said 'Valle San José' is and has for the past two years been vacant and abandoned," and could be granted, "inasmuch as the mission of San Diego, to whom it belonged, had no means sufficient to cultivate and occupy it, and it is not so necessary for the mission."

Any arguments based upon the asserted rights of the mission or pueblo Indian under the Spanish or Mexican régime—and much of the argument on the part of the appellants is on this line—is entirely irrelevant in this case, as the grant under consideration did not interfere with any such alleged rights. Therefore if it were permitted to go behind the patent to the grant itself, there was no defense on the part of the appellants to the plaintiffs' action.

But we are not permitted to go behind the patent in a case like this, and in the light of more recent decisions, both by this court and by the United States courts, Byrne vs. Alas can no longer be considered as authority, more especially as to the consequences resulting from the non-presentation of claims of title to land arising under the laws of Spain or Mexico, and the scope and effect of patents based upon such claims of title.

In Minturn vs. Brower, 24 Cal., 644, it was held that claims founded on perfect titles—that is, such titles as require nothing further to be done at the date of the change of sovereignty—need not be presented for confirmation, under the act of Congress of 1851. And this seems to have been the theory up to the time of Byrne vs. Alas. In consequence it is there held that an Indian title, such as this is claimed to be, namely, the right for themselves and descendants perpetually to possess, use, and occupy the land—without, however, the right of alienation—was a right or title prior and superior to any grant, and could be asserted successfully against such grant, or the patent issued thereon. The court say: "Under the treaty the Government of the United States stood in the place of the Mexican Government. Its patent confirmed the grant, proclaimed it to be good, neither added to nor detracted from it in any way." At the time or just prior to the decision in Byrne vs. Alas, Phelan vs. Poyoreno, same volume (74 Cal., 448), was also decided. In that case the plaintiff claimed under a patent issued upon a confirmed Mexican grant, and the defendants under a grant which was alleged to have conveyed a perfect title, but it had not been presented for confirmation. The judgment below went for the plaintiff, but this court held the unconfirmed grant to be superior in right to the patent, and reversed the judgment. The court there say: "Holders of titles to lands in the ceded territory which were perfect at the date of the treaty could, if they so elected, present them to the commission for confirmation, but were not bound to do so." At the same term Dominguez vs. Botiller, 74 Cal., 457, was decided "upon the doctrine enunciated and for the reasons given in Phelan vs. Poyoreno, ante, page 448."

This latter case, by a writ of error, went to the Supreme Court of the United States, the error assigned being that this court erred "in holding that under the said act of Congress of March 3, 1851, it was not necessary for each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Governments to present such claim to the board of land commissioners under said act."

After a full and thorough discussion of the questions involved, the judgment of this court was reversed. Botiller vs. Dominguez, 130 U. S., 238.

In Beard vs. Fedrey, 3 Wall., 478, the contention was similar to that of the appellants, and the court there say: "The position of the defendants is that as against them the patent is not evidence for any purpose; that as between them and the plaintiff the whole subject of title is open precisely as though no proceedings for the confirmation had been had and no patent for the land had been issued. Their position rests upon a misapprehension of the character and effect of the patent issued upon the confirmation of a claim to land under the laws of Spain and Mexico.

126 In the first place, the patent is a deed of the United States. As a deed its operation is that of a quitclaim, or rather a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when the proceedings were instituted by the filing of the petition before the board of land commissioners. In the second place, the patent is a record of the action of the Government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights and were entitled by the law of nations to protection under them to the same extent as under the former Government. The treaty of cession also stipulated for such protection. The obligation to which the United States thus succeeded was, of course, political in its character and to be discharged in such manner and on such terms as they might judge expedient. By the act of March 3, 1851, they had declared the manner and terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to lands are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the Government; authorized appeals from the decisions of the tribunal, first to the district and then to the Supreme Court, and designated officers to survey and measure off the land when the validity of the claims is finally determined. When informed by the action of its tribunal and officers that a claim asserted is valid and entitled to recognition, the Government acts and issues its patent to the claimant. This instrument is therefore record evidence of the action of the Government upon the title of the claimant. By it the Government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty and might have been located under the former Government, and is correctly located now so as to embrace the premises as they are surveyed and described. As against the Government, this record, so long as it remains unvacated, is conclusive. It is equally conclusive against parties claiming under the Government by title subsequent. It is in this effect of the patent as a record of the Government that its security and protection chiefly lie." The court further defines the meaning of "third persons," mentioned in the fifteenth section of the act of 1851, whose rights are reserved in all patents issued under such act, as follows: "The term 'third person,' as there used, does not embrace all persons other than the United States and the claimant, but only those who hold superior titles, such as will enable them to resist successfully any action

of the Government in disposing of the property." The opinion in this case has been frequently quoted and approved in subsequent cases by the same court. In Knight vs. U. S. Land Association, 142 U. S., 201, property is defined: "And by the term property, as applied to land, all titles are included, legal or equitable, perfect or imperfect."

In Houston vs. The City and County of San Francisco, 47 Fed. Rep., 337, Justice Field, in rendering the opinion of the court, said: "The alleged grant, if one ever existed, was not presented for examination and confirmation to the board of land commissioners for the settlement of private land claims in California under the act of Congress of March 3, 1851. The land embraced within the alleged grant thus became by the express declaration of Congress in that act, which was passed to carry out our treaty obligations with Mexico, and by the decisions of the Supreme Court of the United States thereon, public land no longer subject to any private ownership by virtue of the grant."

In More vs. Steinbach, 127 U. S., 80, after referring to the act of Congress and quoting former decisions in reference to Mexican grants, the court say: "The doctrine invoked by the defendants that the laws of the conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until change be made, does not aid their defense. That doctrine is not applicable to laws concerning the alienation of any portion of the public domain, or to officers charged under the former Government with that power. No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject."

In this case, therefore, if any rights whatever can be conceded to the appellants under the former Mexican Government, such rights were in the nature of private property, or a right dependent upon the will and pleasure of the State or nation. If, as claimed, it were a right to possess, occupy, and use land, that amounted to a title to property. It being a title or right to property, whether in fee simple or possessory merely, derived from the Mexican Government, under the act of Congress of 1851, as repeatedly held, a claim to that right was required to be presented for confirmation. If, on the other hand, it were a mere license at the pleasure of the former Government to occupy the land, such right would not prevent that Government from granting the land unencumbered with such right. This was the case in reference to pueblos under the former regime. The pueblos held title in trust for the use of the inhabitants, not conferred by special grant but under the laws and regulations of Spain and Mexico, and there were many cases where such governments made specific grants within the territorial limits of the pueblos which were, after the change of government, confirmed and patented by the United States under the act of Congress of 1851. The United States, succeeding to all the rights and sovereignty of Mexico, had such power to grant all public lands; that is, all lands not claimed by private parties, and if owned or claimed by private parties and not presented for confirmation the claims were waived or forfeited and such lands thereafter became public lands.

"The ascertainment of existing claims was a matter of vital importance to the Government in the execution of its policy respecting the public lands, and Congress might well declare that a failure to present a claim should be deemed an abandonment of it, and that the lands covered by it should be considered a part of the public domain." Again, "The power to decide upon the validity of any claim presented to land in California by virtue of any right or title derived from the Spanish or Mexican government as matter of original jurisdiction is by the act of 3rd of March, 1851, exclusively conferred upon the commissioners appointed under the first section of that act." Further, "The effect of the inquiry and decision of these tribunals upon the matter submitted is final and conclusive. If unfavorable to the claimant the land 'shall be held and considered as a part of the public domain of the United States,' but if favorable the decrees rendered by the commissioners or the courts 'shall be conclusive between the United States and the claimants.' These acts of Congress do not create a voluntary jurisdiction that the claimant may seek or decline. All claims to lands that are withheld from the board of commissioners during the legal term for their presentations are treated as nonexistent and the land as belonging to the public domain." And, "Claims, whether grounded upon an inchoate or a perfect title, were to be ascertained and adequately protected." United States vs. Castillero, 2 Black, 17; Newhall vs. Sanger, 92 U. S., 761; More vs. Steinbach, supra; Botiller vs. Dominguez, supra.

Appellants' counsel, to ward off the effect of these decisions, particularly the Botiller case, characterize much of the language used in such opinions as pure dictum. But the opinion in this latter case as well as the others quoted have been referred to and adopted by the same court in subsequent cases. In Knight vs. U. S. Land Association, supra, the court say: "The patent being thus conclusive can only be resisted by those who hold paramount title to the premises from Mexico and antedating the title confirmed." De Guyer vs. Banning, 167 U. S., 723.

When unable to meet and answer opinions of the court, it is a custom of counsel, which would be "more honored in the breach than in the observance," to characterize the language used as mere dictum. The answer to such criticism is well stated in the Botiller case itself: "We are unable to perceive any sufficient reason for calling these expressions of the court, whose judgment must be final on the subject, dicta, for we feel bound to say that they were observations pertinent to the matter under consideration and seem to have met the entire approbation of the court in whose behalf they were uttered, and as they embrace a very considerable period of time, during which a contrary opinion would have saved much labor to the court, we must believe that the opinions thus expressed without variation were the well-considered views of this court when they were delivered."

Many of the questions raised here were presented in the case of Los Angeles F. & M. Co. vs. Thompson, 117 Cal., 594. The plaintiffs there relied upon a patent issued on the confirmed grant of the ex-Mission San Fernando. The defense offered to show that the grant was void for the reason that it was an attempted grant of mission lands reserved from and not subject to grant under the laws and regulations of the Mexican

Government, and that the board of land commissioners had no jurisdiction over the subject-matter, and that the decree of confirmation was therefore void. Upon the objection of the plaintiff the evidence was excluded, and this ruling of the court was the principal error assigned. This court, in affirming the judgment in favor of the plaintiff, reviews to some extent the cases already referred to and says: "The board of land commissioners was authorized to adjudicate upon the validity of every claim for land in California which purported to be derived from the Spanish or Mexican Government. The validity of the claim included the authority of the governor to make the grant as well as the existence or effect of the laws of Mexico concerning the same, and the jurisdiction of the board extended to the determination of each of these questions as fully as to determining whether there had been a compliance with the forms of law in making the grant, and its judgment thereon can not be collaterally assailed on account of any error it may have committed in reference thereto." This case, aside from the cases from the United States courts already referred to, affords a complete answer to the contention that the land being occupied by the Indians could not be granted under the laws of Mexico.

But it is claimed that Warner took his title subject to the trust or right of the Indians. Neither the grant nor the patent contains anything to support this contention, and there is no privity between them and the grantee, or anything from which a trust could arise in their favor as against his grant or the patent issued thereon. They are not third persons within the meaning of the fifteenth section of the act of 1851, as already shown, but are mere strangers to the record.

But it is contended that if the Indians are not third "persons" within the meaning of section 15 of the act of 1851 they are protected by section 16 of that act. By that section it is simply made the duty of the commissioners to report the status of the Mission Indians to Congress, so that that body might be able to provide for their future government and to treat them equitably and in accordance with the general policy of the United States. It would appear from that section that the Indians were treated as dependent upon the care and generosity of the Gov-
127 ernment and were not classed as Mexican citizens who held rights to property. The presumption is that the proper inquiry or investigation was had and reported by the proper officers, as required by law, prior to the confirmation of the Warner grant. From the foregoing it follows:

1. That the decision of the land commissioners and other appropriate officers of the Government of the United States, holding to the effect that the land in question was at the time it was granted vacant and subject to absolute alienation, is conclusive on the defendants and all others.

2. That the grant to Warner of the "Valle de San José" was not subject to any right or interest in the defendants, but that he claimed and held the land granted in hostility to the defendants' pretensions, and there is no trust relation existing between Warner and the said Indians.

3. That the patent issued to Warner upon the confirmed grant to the premises in controversy is conclusive against the defendants.

The judgment and order denying a new trial are affirmed.

VAN DYKE, J.

We concur:

HARRISON, J.
GAROUTTE, J.
HENSHAW, J.

DISSENTING OPINION.

I dissent. The case presented by this record can not, in my opinion, be distinguished in any material respect from Byrne vs. Alas, 74 Cal., 628.

It is true the grant to Warner, under which the appellant claims, did not contain the provision quoted from the Estudillo grant (74 Cal., 635), that "he shall in no way disturb nor molest the Indians who are established or living thereon at the present time," but it was an express condition of the Warner grant that he should not interfere with the roads or other "servidumbres," and it appears from the authorities cited by appellant that the word servidumbres had a meaning in Spanish law broad enough to include the servitude corresponding to the right of occupancy claimed by these defendants as successors of the Christianized mission Indians, who, according to the evidence excluded by the superior court, were established and living upon some, at least, of the lands in controversy long before the date of the Warner grant.

The claim that our decision in Byrne vs. Alas has been overturned by subsequent decisions of the Supreme Court of the United States is, I think, unsupported by the cases cited by counsel, and in the absence of controlling authority I am unwilling to depart from the doctrine established here upon mature consideration.

BEATTY, C. J.

DISSENTING OPINION.

I dissent. In addition to what is said in the dissenting opinion of the chief justice, I think that the privileges of the Indians would have been preserved even if, in the grant to Warner, there had been no express words of reservation which could be construed as including them—if there had been no express reservation whatever. I think that under the general law applicable to the subject—written and unwritten—running back through Mexican and Spanish dominion to the sixteenth century, the legal title to the lands like those in question here, always passed subject to the right of the Indians to occupy them as they had been accustomed to "in such manner as that they shall not stand in need of the necessaries of life." See Byrne vs. Alas, 74 Cal., and the authorities there cited. I do not think that they were required to present their claims to the land commission, or that they are even to be charged with knowing that there was such a commission, or with a knowledge of the law generally. They are mere wards of the nation, and it is to be presumed that the nation has always recognized and protected their customary rights, and that all

its grants are made with the understanding that the grantees know those rights, and take subject to them.

McFARLAND, J.

I concur:

TEMPLE, J.

128 In the supreme court of the State of California.

L. A. No. 490. Bank.

J. DOWNEY HARVEY, ADM., ETC., MERCHANTS Exchange Bank of S. F., resp.,
vs.
ALLIJANDRO BARKER ET AL., APPELLANTS.

On appeal from the superior court in and for the county of San Diego.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Van Dyke, J. We concur: Harrison, J.; Garoutte, J.; Henshaw, J.

Dissenting opinion, Beatty, C. J.

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of San Diego in the above-entitled cause be, and the same are hereby, affirmed.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 4th day of October, 1899, and now remaining of record in my office.

Witness my hand and the seal of the court affixed at my office this 4th day of November, A. D. 1899.

[SEAL.]

GEO. W. ROOT, *Clerk.*
By J. J. DUNCAN, *Deputy.*

(Indorsed:) L. A. No. 490, in the supreme court, State of California. Remittitur. Harvey et al. adm., etc., vs. Barker et al. Clerk's costs, $. Paid by appellant, $12.50. Paid by respondent, $. Total, $12.50. Geo. W. Root, clerk. By J. J. Duncan, deputy.

129 Supreme Court of the United States.

ALLEJANDRO BARKER, BALERIANA BARKER, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Molasquez, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chante, Francisco Nauwila, Guadelupe Nauwila, Maria Ignacio Nauwila, José Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, José Blacktooth, Inez Blacktooth, Salvador Changalagash, Tomasa, Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isidora Pena, José Maria Chavez, Pasquel Peloat, Francisca Peloat, José Juan Oulingawish, Cecelio Tashwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpia Rodrigez, Francisco Nawilot, Anastasia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, José Antonia Sivimoat, Rosaria Oulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecilio Chiporosa, Francisco Loss, José Cecilio, Salvador Gorra, Publicate Logrede, José Meechao, Concenciona Meechao, Valentin Meechao, José Maria Mata, José Antonio Soto, Marcelino Quashish, Josefa Quashish and Juan Deneati, plaintiffs in error,

vs.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE estate of John G. Downey, deceased (substituted for John G. Downey), and the Merchants' Exchange Bank of San Francisco, a corporation, defendants in error.

In error to the supreme court of the State of California.

Assignments of error.

130 Now come the plaintiffs in error and, for assignment of error in this case, allege that the supreme court of the State of California, in giving its decision and judgment in the above-entitled cause, did commit error as follows, to wit:

ASSIGNMENT OF ERROR NO. 1.

This is an action to quiet title to and recover possession of certain lands in San Diego County, California. The plaintiffs assert title to the lands in controversy under and by virtue of a United States patent based upon two confirmed Mexican grants; such patent having been issued under and in pursuance of proceedings had under the act of Congress of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."

The defendants in possession claim to be Mission Indians, and, that they have been in the possession, use, and occupancy of these lands ever since a time long prior to the date of the Mexican grants upon which plaintiffs' title is based, and that during all of such time they have claimed the right so to use, occupy, and possess such property as against all the world, without, however, the right to dispose of the same; and they claim that under and by virtue of the Spanish and Mexican law existing in the ceded territory prior to the transfer of sovereignty to the United States, Indians such as these were entitled for themselves and their descendants to the continued use and occupancy of the lands of which they were possessed and which they were using, so long as they or any of their descendants remained in such possession and use, without,
131 however, having the power of alienation; and all private grants of such lands made by the Mexican Government were under the law subject to such general right of use and occupancy in the Indians, although the grants including such lands were silent upon this subject. Defendants further claim, however, that in the grant upon which plaintiffs' title rests the defendants right to continued use and occupancy of these lands was expressly preserved and protected; they claim that, under and by virtue of the provisions of the treaty of Guadalupe Hidalgo between the United States and the Government of Mexico, their usufructuary rights in these lands were preserved and protected. Defendants never presented their claim to their usufructuary rights in these lands to the board of land commissioners, appointed under the act of Congress of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and it is their claim that they were relieved of the necessity of presenting their claims to such board, for the reason that the sole purpose of the act of Congress in question was to segregage private property from public domain and to fix the boundaries of each, and that proceedings had and patents issued thereunder were binding upon the United States and the claimant only, and upon parties claiming under the United States by title subsequent to the change of sovereignty, but were not binding upon third persons claiming an interest in the lands by a right or title prior and paramount to that confirmed and patented. And defendants claim that the requirements of such law as to these lands were fully met and complied with, and such lands adjudged to be private property, and not a part of the public domain by the presentation to the board of land commissioners of the claim
132 of one Juan J. Warner therefor (plaintiffs' predecessor in interest, the original grantee from the Mexican Government), and by the confirmation and patenting of such claim that this vested the legal title in Warner and operated to relieve the defendants from the necessity of presenting their claims to such board, but did not change the character or extent of Warner's claim or title, but the same remained just as formerly subject to the usufructuary rights of the defendants and charged with all of the lawful uses and subject to all of the lawful trusts previously existing. That the defendants are "third persons" as such term is used in the 15th section of the statute in question, whose rights are not concluded by proceedings had thereunder. That as under the Mexican regime the grantee held the legal title in trust for the defendants who were the beneficial owners entitled to the use and enjoyment of the lands,

this relation of privity of estate and trust was not cut off or extinguished by confirmation and patent to the grantee Warner. Defendants further claim that they were wards of the Mexican nation, and by the transfer of sovereignty became and ever since have been wards of this nation, and that it was not intended that they should be compelled to present their claims to the board of land commissioners for confirmation under penalty of forfeiture for failure so to do.

Plaintiffs on the other hand claim that their patent from the United States is conclusive of the entire controversy, and that all evidence as to the defendants being Mission Indians, or as to their ancient and continued use, occupancy, and possession of these lands, is immaterial and
133 inadmissible, and all of such evidence was objected to on that ground. All testimony of defendants was introduced under such objections of plaintiffs and was permitted temporarily to be received, but such objections thereto were subsequently after the cause had been submitted, sustained, and all of such testimony of defendants stricken out and judgment given for plaintiff, and defendants' motion for a new trial denied. This position has been sustained by the supreme court of California, Chief Justice Beatty and Justices Macfarland and Temple dissenting, the majority of said court having held that the patent to plaintiff's predecessor in interest was conclusive of the entire controversy, and that all claims of the defendants were lost by not being presented for confirmation to the board of land commissioners appointed under the act of Congress above mentioned; that defendants were not third persons whose rights were protected under the 15th section of such act of Congress, but were mere strangers to the title, and that all evidence as to the former property rights of such defendants and their ancestors under the Mexican law was therefore immaterial, inadmissible, and properly stricken out.

Plaintiffs in error claim that the supreme court of California committed error in its judgment as follows:

First. In holding that the patent under which plaintiffs below, defendants in error here, held title, was conclusive of the entire controversy between the parties.

Second. In sustaining the decision of the trial court excluding all of the evidence of the defendants below, plaintiffs in error, showing
134 their rights under the Mexican law in the lands in controversy.

Third. In holding that all claims, including those of Mission Indians to property in California derived from the Spanish or Mexican Government, were lost if not presented to the board of land commissioners for confirmation under the act of Congress of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."

Fourth. In holding that defendants below, plaintiffs in error, were strangers to the title and not "third persons" under the 15th section of the act of Congress of March 3rd, 1851, above referred to.

Plaintiffs in error claim that the error committed by the supreme court of the State of California in its judgment as aforesaid is reviewable by this court, on the ground that the judgment of said supreme court of California is against the title, right, privilege, and exemption specifically set up and claimed by plaintiffs in error under the treaty between the United States and Mexico, known as the treaty of Guadalupe Hidalgo,

and under the act of Congress of the United States of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."

ASSIGNMENT OF ERROR NO. 2.

The assignments of error in the decision of the trial court—the superior court of San Diego County, California—upon defendants' motion in said court for a new trial of said cause, the same appearing in the tran-
135 script on appeal from said lower court to the supreme court of the State of California, are each and all well taken, and constitute good and sufficient grounds for the reversal of said trial court by the supreme court of the State of California; and each and every assignment of error contained in such transcript on appeal—both as to errors of law occurring at the trial and duly excepted to, and as to specifications of the insufficiency of the evidence to justify the decision and judgment of the court—are hereby reiterated and deemed repeated as a portion of this assignment of error in the judgment and decision of the supreme court of the State of California, as fully as if the same had been here repeated in full, reference being made to such transcript on appeal for a full statement thereof.

Wherefore plaintiffs in error allege that in the particulars set forth in such assignments of error in said transcript on appeal contained, the judgment of the supreme court of the State of California affirming the decision of the trial court, is error reviewable by this court, in that it is against the title, right, privilege, and exemption specifically set up and claimed by plaintiffs in error under the treaty between the United States and Mexico, known as the treaty of Guadalupe Hidalgo, and under the act of Congress of the United States of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."

Wherefore plaintiffs in error pray that the said judgment of the
136 supreme court of the State of California against them rendered on the 4th day of October, 1899, may be reversed and that judgment be rendered for plaintiffs in error as prayed for in their original answer filed in said cause.

SHIRLEY C. WARD,
FRANK P. FLINT,
FRANK D. LEWIS,
Attorneys for Plaintiffs in Error.

137 In the supreme court of the State of California.

J. DOWNEY HARVEY, ADMINISTRATOR, ETC., ET AL., plaintiffs and respondents,
vs.
ALLEJANDRO BARKER ET AL., DEFENDANTS AND appellants.
} L. A. No. 490.

Petition for writ of error.

Defendants in the above entitled cause feeling themselves aggrieved by the judgment entered therein upon the 4th day of October, 1899,

come now, by Frank P. Flint, United States attorney for the southern district of California, Shirley C. Ward, and Frank D. Lewis, their attorneys, and petition the court for an order allowing said defendants to prosecute a writ of error to the honorable United States Supreme Court under and according to the laws of the United States in that behalf made and provided; and such writ of error having been directed to be taken to the United States Supreme Court by the Department of Justice of the United States and no bond in such case being required by law, and all bond having been specially waived by stipulation of the plaintiffs on file herein, which said stipulation consents that writ of error herein shall operate as a supercedeas, it is therefore asked that all further proceedings in this court be suspended and stayed until the deter-
138 mination of said writ of error by the United States Supreme Court.

And your petitioners will ever pray.

SHIRLEY C. WARD,
FRANK D. LEWIS,
FRANK P. FLINT,
Attorneys for Defendants.

(Indorsed:) L. A. 490. Filed Nov. 6, 1899. Geo. W. , clerk; by C. W. Johnson, deputy.

139 In the supreme court of the State of California.

J. DOWNEY HARVEY, ADMINISTRATOR, ETC., ET AL., plaintiffs and respondents,
vs.
ALLEJANDRO BARKER ET AL., DEFENDANTS AND appellants.
} L. A. No. 490.

Order allowing writ or error without bond.

Upon filing petition for writ of error in the above-entitled cause, and on filing an assignment of errors, it is ordered that a writ of error be and is hereby allowed to have reviewed in the United States Supreme Court the judgment heretofore entered herein; and such writ of error having been directed to be taken by the Department of Justice of the United States, and plaintiffs having filed herein a stipulation in writing waving all bond and consenting that writ of error shall operate as supercedeas staying execution of the judgment in this cause until the writ of error was finally determined by the United States Supreme Court, it is therefore ordered that the writ of error hereby allowed shall operate as a supercedeas and shall stay execution of the judgment of this court pending the action of the Supreme Court of the United States thereon.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

(Indorsed:) L. A. 490. Filed Nov. 6, 1899. Geo. W. Root, clerk. By A. W. Johnson, deputy.

140 [Citation.]

UNITED STATES OF AMERICA, ss.

To J. Downey Harvey, administrator of the estate of John G. Downey, deceased (substituted for John G. Downey), and the Merchants' Exchange Bank of San Francisco, a corporation, defendants in error, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Allejandro Barker, Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasquez, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chante, Francisco Nauwila, Guadelupe Nauwila, Maria Ignacio Naurila, José Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, José Blacktooth, Inez Blacktooth, Salvador Changagash, Tomasa Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Oulcot, Isadora Pena, José Maria Chavez, Pasquel Peloat, Francisca Peloat, Jose Juan Oulingawish, Cecelio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpia Rodrigez, Francisco Nawilot, Anastasiä Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, José Antonio Sivimoat, Rosaria Aulingawawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecelio Chiporosa, Francisco Loss, José Cecelio, Salvador Gorra, Publicata Logrede, José
141 Meechao, Concenciona Meechao, Valentin Meechao, José Maria Muta, José Antonio Soto, Marcelino Quashish, Josefa Quashish, and Juan Demati, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable W. H. Beatty, chief justice of the supreme court of the State of California, this the 6th day of November, in the year of our Lord one thousand eight hundred and ninety-nine.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

142 Due service and receipt of a copy of the within and foregoing citation admitted this 10th day of November, A. D. 1899.

WHITE & MONROE,
Attorneys for Defendants in Error.

Due service and receipt of a copy of the within and foregoing citation admitted this 13th day of November, A. D. 1899.

J. DOWNEY HARVEY,
Administrator, etc., Defendant in Error.
THE MERCHANTS' EXCHANGE BANK
OF SAN FRANCISCO,
WM. A. M. VAN BOKKELA, *Sec.*,
Defendant in Error.

143 (Indorsed:) In the Supreme Court of the United States. Allejandro Barker et al., plaintiffs in error, vs. J. Downey Harvey, administrator, etc., et al., defendants in error. (Original.) Citation.

144 In the supreme court of the State of California.

J. DOWNEY HARVEY, ADM., ETC., ET AL., RESPONDENTS,
vs.
ALLEJANDRO BARKER ET AL., APPELLANTS. } L. A. 490.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of transcript opinion of the court, judgment, assignment of errors, petition for writ, order allowing writ without bond, original writ, and original citation, pages 1 to 143, inclusive, the same constituting the papers on writ of error in the above-entitled action, as shown by the records of my office.

Witness my hand and the seal of the court, this 18th day of November, 1899.

[SEAL.]

GEO. W. ROOT, *Clerk.*
By A. W. JOHNSON, *Chief Deputy.*

145 (Indorsed:) L. A. 490. In the supreme court, State of California. Harvey, adm., etc., et al., vs. Barker et al.

145 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the honorable judges of the supreme court of the State of California, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of California before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. Downey Harvey, administrator of the estate of John G. Downey, deceased (substituted for John G. Downey), and the Merchants' Exchange Bank of San Francisco, a corporation, plaintiffs, and Allejandro Barker, Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenoiona Sivimoat, Salvador Nolasquez, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chante, Francisco Nauwila, Guadelupe Nauwila, Maria Ignacio Naurila, Jose Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, Jose Blacktooth, Inez Blacktooth, Salvador Changalagash, Tomasa Nowilot, Francisco Anderson, Pasquala Anderson, Margarita Oulcot, Isadora Pena, Jose Maria Chavez, Pasquel Peloat, Francisco Peloat, Jose Juan Oulingawish, Cecilio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat,

146 Policarpia Rodrigez, Francisco Nawilot, Anastasia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Savivil, Francisca Chutnicat, Silverio Nolasquez, Jose Antonia Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona

Chavez, Ambrose Ortega, Cecilio Chiporosa, Francisco Loss, Jose Cecilio, Salvador Gorra, Publicate Lograde, Jose Meechac, Concenciona Meechac, Valentin Meechac, Jose Maria Muta, Jose Antonio Soto, Marcelina Quashish, Josepha Quashish, and Juan Demati, defendants, wherein was drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Allejandro Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasquez, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivi-
147 moat, Roman Pena, Juan Chante, Francisco Nauwila, Guadelupe Nauwila, Maria Ignacio Naurila, Jose Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, Jose Blacktooth, Inez Blacktooth, Salvador Changagash, Tomasa Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isadora Pena, Jose Maria Chavez, Pasquel Peloat, Francisca Peloat, Jose Juan Oulingawish, Cecelio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpia Rodrigez, Francisco Nawilot, Anastasia Nawilot, Maria Antonio Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, Jose Antonia Sivimoat, Rosaria Aulingawish Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecelio Chiporosa, Francisco Loss, Jose Cecilio, Salvador Gorra, Publicate Logrede, Jose Meechao, Concenciona Meechao, Valentin Meechao, Jose Maria Muta, Jose Antonio Soto, Marcelino Quashish, Josefa Quashish, and Juan Demati, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to
148 the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of January, in the year of our Lord nineteen hundred.

[SEAL.] SOUTHARD HOFFMAN,

Clerk U. S. Circuit Court, Northern District of California.

The foregoing writ of error is hereby allowed; and the same having been directed to be taken by the Department of Justice of the United States, and the defendants in error having waived in writing all bond and consented that writ of error may operate as a supersedeas,

It is hereby ordered that no bond be required for the prosecution of said writ and that the same operate as a supersedeas.

W. H. BEATTY,

Chief Justice of the Supreme Court of the State of California.

149 (Indorsed:) Original. L. A. 490. Supreme Court, State of California. Harvey, et al., adm. etc., vs. Baker, et al. Writ of error. Filed Jan. 19, 1900. Geo. W. Root, clerk; by A. W. Johnson, deputy.

150 UNITED STATES OF AMERICA, ss.

To J. Downey Harvey, administrator of the estate of John G. Downey, deceased (substituted for John G. Downey), and the Merchants' Exchange Bank of San Francisco, a corporation, defendants in error, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Allejandro Barker, Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasquez, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chante, Francisco Nauwila, Guadelupe Nauwila, Maria Ignacio Naurila, Jose Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, Jose Blacktooth, Inez Blacktooth, Salvador Changagash, Tomasa Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isadora Pena, Jose Maria Chavez, Pasquel Peloat, Francisca Peloat, Jose Juan Oulingawish, Cecelio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpia Rodrigez, Francisco Nawikot, Anastasia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, Jose Antonia Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth,

151 Chona Chavez, Ambrose Ortega, Cecelio Chiporosa, Francisco Loss, Jose Cecelio, Salvador Gorra, Publicate Logrede, Jose Meechao, Concenciona Meechao, Valentin Meechao, Jose Maria Muta, Jose Antonio Soto, Marcelino Quashish, Josefa Quashish and Juan Demati, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error as to said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, this the 17th day of January, in the year of our Lord nineteen hundred.

W. H. BEATTY,

Chief Justice of the Supreme Court of the State of California.

152 Receipt of a copy of the within and foregoing citation admitted this 19th day of January, A. D. 1900.

WHITE & MONROE,
Attorneys for Defendants in Error.

Receipt of a copy of the within and foregoing citation admitted this 20 day of January, A. D. 1900.

THE MERCHANTS' EXCHANGE BANK OF SAN FRANCISCO,
WM. A. M. VAN BOKKELEN, *Sec., Defendant in Error.*
J. DOWNEY HARVEY, *Administrator of the Estate of John G. Downey, deceased, Defendant in Error.*

153 In the supreme court of the State of California.

J. DOWNEY HARVEY, ADM., ETC., ET AL., respondents,
v.
ALLEJANDRO BARKER ET AL., APPELLANTS. } L. A. 490.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of transcript opinion of the court, judgment, assignment of errors, petition for writ, order allowing writ without bond, original writ, and original citation, pages 1 to , inclusive, the same constituting the papers on writ of error in the above-entitled action, as shown by the records of my office.

Witness my hand and the seal of the court this 5th day of February, A. D. 1900.

[SEAL.]

GEO. W. ROOT, *Clerk.*
By A. W. JOHNSON, *Chief Deputy.*

154 (Indorsed:) L. A. No. 490. In the supreme court, State of California. Harvey, adm., etc., et al., vs. Barker et al.

(Indorsed:) Original. L. A. 490. Supreme court, State of California. Harvey et al., adm., etc., vs. Barker et al. Citation. Filed Feb. 5, 1900. Geo. W. Root, clerk, by A. W. Johnson, deputy.

(Indorsement on cover:) File No. 17650. California supreme court. Term No. 536. Allejandro Barker, Baleriana Barker, Angela Barker, et al., plaintiffs in error, vs. J. Downey Harvey, administrator of the estate of John G. Downey, deceased, and the Merchants' Exchange Bank of San Francisco. Filed February 21st, 1900.

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